*Together with No. 425, Gustav Schoenamsgruber v. Hamburg American Line.

Card 1

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 424

HILDEGARD SCHOENAMSGRUBER, BY GUSTAV SCHOENAMSGRUBER, HER GUARDIAN, PETITIONER,

vs.

THE HAMBURG AMERICAN LINE, CLAIMANT OF THE MOTORSHIP "THE OAKLAND," HER ENGINES, ETC.

No. 425

GUSTAV SCHOENAMSGRUBER, PETITIONER,

vs.

THE HAMBURG AMERICAN LINE, CLAIMANT OF THE MOTORSHIP "THE OAKLAND," HER ENGINES, ETC.

UPON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONS FILED SEPTEMBER 24, 1934.

CERTIORARI GRANTED OCTOBER 22, 1934.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 424

HILDEGARD SCHOENAMSGRUBER, BY GUSTAV SCHOENAMSGRUBER, HER GUARDIAN, PETITIONER,

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Southern Division of the United States District Court, Northern District of California

No. 21091-S

HILDEGARD SCHOENAMSGRUBER, by GUSTAV SCHOENAMSGRUBER, her Guardian ad Litem,

Libelant,

vs.

The Motorship "THE OAKLAND" her Boilers, Engines, etc.,

and

THE HAMBURG AMERICAN LINE, a corporation,

Libelees.

No. 21092-S

GUSTAV SCHOENAMSGRUBER,

Libelant,

vs.

The Motorship "THE OAKLAND", her Engines, Boilers, etc.,

and

THE HAMBURG AMERICAN LINE, a corporation,

Libelees.

(THE HAMBURG AMERICAN LINE, a corporation, Claimant of the Motorship "THE OAKLAND".)

PROCTORS.

VINCENT W. HALLINAN, Esq.,
EMMETT R. BURNS, Esq.,
369 Pine St., San Francisco, California,
S. T. HOGEVOLL, Esq.,
Pacific Building, San Francisco, California,
For Libelants.

J. HAMPTON HOGE, Esq.,
315 Montgomery St., San Francisco, California,
DERBY, SHARP, QUINBY & TWEEDT, Esqs.,
Merchants Exchange Building, San Francisco, California,
For Respondents and Claimant.

In the District Court of the United States in and for the Northern District of California, Southern Division.

In Admiralty.
21091-S

HILDEGARD SCHOENAMSGRUBER,
By GUSTAV SCHOENAMSGRUBER, her Guardian ad litem,
Libelant,

vs.

The Motorship "THE OAKLAND", her Boilers, Engines, etc.,

and

THE HAMBURG AMERICAN LINE,
a Corporation,
Libelees.

LIBEL IN REM AGAINST THE S. S. "THE OAKLAND" AND IN PERSONAM AGAINST THE HAMBURG AMERICAN LINE.

DAMAGES FOR $250,000.00 Claimed for Breach of Contract for Safe Carriage of Passenger.

To the Honorable Judges of the District Court of the United States in and for the Northern District of California.

The libel of Hildegard Schoenamsgruber by Gustav Schoenamsgruber, her father and guardian ad litem, in a cause of action for violation of a contract to safely carry the said Hildegard Schoenamsgruber on the said vessel "The Oakland" against the said Oakland, her engines, etc., and against the said Hamburg American Line, in a cause of action for damages for breach of contract, civil and maritime propounds and alleges, as follows, to-wit:

(I)

That the said Hildegard Schoenamsgruber is an infant of the age of nine years, a resident of the Northern District of California, and that by an order [1*] duly given and made at the time of the commencement of this action, the said Gustav Schoenamsgruber was duly appointed the guardian ad litem in the above entitled action.

(II)

The libelant alleges on information and belief, that the said Hamburg American Line is a foreign

*Page numbering appearing at the foot of page of original certified Transcript of Record.

corporation having an office and doing business in the City and County of San Francisco, State of California.

(III)

That at all the times herein set out the said libelee, the Hamburg American Line was the owner of and the operator of a certain vessel, named the Oakland, which said vessel was used by the said Hamburg American Line for the carrying of passengers from the City of Hamburg, Germany, to the City and County of San Francisco, State of California.

(IV)

That on or about the 30th day of October, 1929, at Hamburg, Germany, the said libelees agreed with the said Gustav Schoenamsgruber, that for a valuable consideration, they undertook to safely carry the said Hildegard Schoenamsgruber from the said City of Hamburg, Germany, to the City and County of San Francisco, State of California. The said Hildegard Schoenamsgruber being then of the age of six years, and was the daughter of said Gustav Schoenamsgruber and Louise Schoenamsgruber.

(V)

That on or about said 30th day of October, 1929, the said Hilda Schoenamsgruber entered on her voyage from the said City of Hamburg to the City and County of [2] San Francisco in said vessel, named "The Oakland".

(VI)

That said libelees broke and violated said contract in this that they did not safely carry said minor as agreed upon, in this that they kept and maintained on said vessel a chief cook who was infected with gonorrhea, and as the said mother of said minor child was suffering with seasickness, the said chief cook by the use of candies enticed the said Hildegard Schoenamsgruber into his cabin, and then and there infected the said six year old minor child with the said gonorrhea. The said libelees were at said time negligent and violated their contract in two particulars, namely, by not caring for said infant when her mother by reason of seasickness was unable so to do, and also by keeping and maintaining a chief cook, who by reason of his said infection was wholly unfit to have on board said vessel.

(VII)

That said Hildegard Schoenamsgruber was, by reason of her tender age and inexperience not able to guard herself from any injury from said chief cook. That she suffered great pain by reason thereof, and neither her father nor her mother knew what was the trouble with her until about four months after said vessel arrived in San Francisco, California, on or about the month of April, 1930.

(VIII)

That said Hildegard Schoenamsgruber was at the time of her said infection of the age of six years.

That [3] she had under the American experience tables an expectancy of life of fifty-two years. That she is now suffering and will for a period of fifty-two years from said date continue to suffer by reason of said neglect of said libelee in not giving her a safe transportation as agreed upon in the said contract.

That said disease is painful and humiliating and will by reason thereof cause the said minor libelant to suffer great mental pain in the future.

That by reason of the premises the said libelees have damaged and injured the said Hildegard Schoenamsgruber in the sum of Two Hundred and Fifty Thousand Dollars.

(IX)

That said vessel is now in the harbor of San Francisco and within the admiralty and maritime jurisdiction of the above entitled court.

(X)

That all and singular the premises are true and within the admiralty jurisdiction of the above entitled court.

(XI)

That the neglect of giving the said Hildegard a safe transportation from Hamburg, Germany, to San Francisco, California, is the direct and proximate cause of said injury to said Hildegard Schoenamsgruber. That she was damaged in the sum of

$250,000. WHEREFORE the libelant prays judgment for the sum of Two Hundred and Fifty Thousand (250,000.00) Dollars.

WHEREFORE the libelant prays that process in due form of law may issue out of and under the seal of this [4] court as in causes of admiralty and maritime jurisdiction, against the said vessel, "The Oakland", her engines, boilers, tackle, apparel and other furniture, and against any and all persons having or pretending to have any right, title, or interest in said vessel. That said vessel, together with her engines, tackle, apparel and furniture may be sold to satisfy the said demand of the said libelant. That she may have a judgment for the said sum prayed for in the libel. That the said libelee be ordered to appear and answer under oath each and all of the premises aforesaid.

That process in personam in due form of law may issue against the said Hamburg American Line. That the said Hamburg American Line may be cited to appear and answer under oath, each and all of the matters aforesaid.

That the said libelant may have such further relief in law, equity or admiralty, as she may be entitled to.

VINCENT W. HALLINAN,
EMMETT R. BURNS,
S. T. HOGEWOLL,
Proctors for the Libelant. [5]

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO.—ss.

Gustav Schoenamsgruber, being by me first duly sworn on his oath, deposes and says, that he is the guardian ad litem for the libelant in the within libel, that he has read the said libel and knows the contents thereof, that the same is true of his own knowledge, except as to matters alleged on his information and belief, and as to those matters he believes them to be true.

GUSTAV SCHOENAMSGRUBER.

Subscribed and sworn to before me this 5th day of July, 1932.

[Seal] MIGNON JACOBI,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jul. 5, 1932, 2:01 P. M. Walter B. Maling, Clerk. [6]

[Title of Court and Cause.]

PETITION FOR THE APPOINTMENT OF A GUARDIAN AD LITEM.

To the Honorable, the District Court of the United States in and for the Northern District of California:

The petition of Gustav Schoenamsgruber respectfully shows: That he is a resident of the State of California, and the father and legal guardian of Hildegard Schoenamsgruber. That the said Hilde Schoenamsgruber is an infant of the age of nine years. That the petitioner has the care and custody of the said minor. That no guardian has been appointed.

That she has filed a libel in admiralty against a vessel named "The Oakland" by reason of misconduct against her on said vessel while she was a passenger. That for more particulars a duly verified libel is hereby referred to and made a part of this petition.

That your petitioner is the father of said minor and above the age of twenty-one years.

WHEREFORE he prays that an order be made appointing him the guardian ad litem in said action.

Dated this 5th day of July, 1932.

GUSTAV SCHOENAMSGRUBER,
Petitioner.

Attorneys for Petitioner. [7]

[Endorsed]: Filed Jul. 5, 1932, 2:17 P. M. Walter B. Maling, Clerk. [8]

[Title of Court and Cause.]

ORDER APPOINTING GUARDIAN AD LITEM.

On reading the petition of Gustav Schoenamsgruber, it appears that he is the father of the said libelant and that a cause of action exists against the said libelees. That the said Heldegard Schoenamsgruber is a minor of the age of nine years, and that the said petitioner, Gustav Schoenamsgruber is the father and has the care and custody of said minor, and that it is proper to appoint him the guardian ad litem in the above entitled cause.

IT IS THEREFORE ORDERED, That said Gustav Schoenamsgruber be and he is hereby appointed the guardian ad litem in the above entitled cause.

Dated at San Francisco, California, this fifth day of July, 1932.

ALBERT M. SAMES,
United States District Judge.

[Endorsed]. Filed Jul. 5, 1932. Walter B. Maling, Clerk. [9]

In the District Court of the United States in and for the Northern District of California, Southern Division.

In Admiralty.
21092-K

GUSTAV SCHOENAMSGRUBER,

Libelant,

vs.

The Motor Ship, "THE OAKLAND", her Engines, Boilers, etc.

and

THE HAMBURG AMERICAN LINE (a corporation),

Libelees.

LIBEL IN REM AGAINST "THE OAKLAND" AND IN PERSONAM AGAINST THE HAMBURG AMERICAN LINE FOR BREACH OF CONTRACT FOR NOT SAFELY CARRYING AN INFANT CHILD.

AMOUNT CLAIMED $50,000.00.

To the Honorable Judges of the District Court of the United States in and for the Northern District of California:

The libel of Gustav Schoenamsgruber on behalf of himself and his wife, Mrs. Gustav Schoenamsgruber, in a cause of action for violation of a contract to safely carry their minor child, Hildegard Schoenamsgruber on a vessel named "The Oakland" against the said Oakland, her engines, etc. and

against the Hamburg American Line, a Corporation, in a cause of action for damages for breach of contract, civil and maritime, propounds and alleges as follows, to-wit:

(I)

That the said libelant and his wife are residents of the State of California and reside in the above named Northern District of California.

(II)

The libelant alleges on his information and belief, that the said Hamburg American Line is a foreign corporation, doing business in the City and County of [10] San Francisco, State of California.

(III)

That at all the times in this libel set out the said libelee, the Hamburg American Line was the owner of and the operator of a certain vessel, named "The Oakland" which said vessel was used by the said Hamburg American Line for the carrying of passengers from the City of Hamburg, Germany, to the City and County of San Francisco, State of California.

(IV)

That on or about the 30th day of October, 1929, the said libelant and his wife, agreed with the said Hamburg American Line, that for a valuable consideration, they undertook to safely carry their minor child, Hildegard Schoenamsgruber, of the age of six years, across the ocean from Hamburg,

Germany, to the City and County of San Francisco, State of California.

(V)

That on or about the 13th day of October, 1929, the said minor child entered on her voyage on said vessel from the City of Hamburg, Germany, to the City and County of San Francisco, California.

(VI)

That said libelees and each of them thereupon broke and violated said contract to safely carry the said minor child, Hilda Schoenamsgruber from the said City of Hamburg to the said City and County of San Francisco in the following particulars, to-wit:

The said libelees kept and maintained on said vessel a certain chief cook who was wholly unfit to be and remain and mix with passengers by reason of that he suffered from gonorrhea, a very contagious and dangerous [11] disease.

That while the libelant's wife was suffering from seasickness and by reason thereof was not able to look after and care for said Hildegard Schoenamsgruber, the said chief cook by the use of candies enticed the said Hildegard Schoenamsgruber into his cabin, and did infect the said minor child with gonorrhea.

That it was the duty of said libelees when they knew that the mother of said infant was by reason of seasickness unable to care for said child, to

properly care for said child, and carefully protect the child from the said danger of being enticed into the cabin of said unfit seaman on said vessel. That said libelees further violated their duty in this that it was the duty to properly examine all members of the crew and ascertain that none had gonorrhea on entering the service of said vessel.

That said duty was violated and the violation thereof was the direct and proximate cause of the said infection to said minor child.

(VII)

That said Hildegard Schoenamsgruber was, by reason of her age and inexperience not able to guard herself from any injury from said chief cook. That she suffered great pain by reason thereof, and neither this libelant nor his wife knew until about four months after the voyage what was the trouble with her. That to see her suffer and knowing from what she suffered caused the said libelant and his wife great mental pain and will for long time to come cause them mental pain and suffering.

(VIII)

That said libelant has so far expended the sum of [12] ..... for medical treatment by reason of said infection of said minor child. That on the trial of this action the libelant will ask leave to amend the libel by inserting therein the correct amount expended, or to be expended in the future.

(IX)

That the reason for the delay in bringing this action is the fact that said libelees are both non-residents, and have been absent from the State for the greater part of the time since the date of said wrongful act of infection.

(X)

That by reason of the premises the said libelants have damaged the said libelee in the sum of Fifty Thousand ($50,000.00) Dollars.

(XI)

Wherefore the libelant prays judgment against the said libelees in the sum of Fifty Thousand ($50,000.00) Dollars.

(XII)

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States District Court in and for the Northern District of California.

(XIII)

That said vessel is now in the harbor of the City and County of San Francisco, State of California, and within the jurisdiction of this Honorable Court.

WHEREFORE the libelant prays that process in due form [13] of law may issue out of and under the seal of this Court as in causes of admiralty and maritime jurisdiction against the said vessel, "The

Oakland" her engines, boilers, tackle, apparel and other furniture, and against any and all persons having or pretending to have any right, title, or interest in said vessel. That said vessel, together with her engines, tackle, apparel and other furniture may be sold to satisfy the claim of the libelant. That he may have a judgment for the sum prayed for in the libel. That the said libelee be ordered to appear and answer under oath each and all of the premises aforesaid.

That process in personam in due form of law may issue against the said Hamburg American Line. That the said Hamburg American Line may be cited to appear and answer under oath each and all of the premises aforesaid.

That this libelant may have such further relief as he in law, admiralty, or equity may be entitled to.

VINCENT W. HALLINAN,
EMMETT R. BURNS,
S. T. HOGEVOLL,
Proctors for the Libelant. [14]

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO.—ss.

Gustav Schoenamsgruber, being by me first duly sworn on his oath, deposes and says, that he has read the foregoing libel and knows the contents thereof, that the same is true of his own knowledge, except as to matters alleged on his information and belief, and as to those matters he believes them to be true.

GUSTAV SCHOENAMSGRUBER.

Subscribed and sworn to before me this 5th day of July, 1932.

[Seal] MIGNON JACOBI,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jul. 5, 1932. Walter B. Maling, Clerk. [15]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 18th day of July, in the year of our Lord one thousand nine hundred and thirty-two.

PRESENT: The Honorable FRANK H. KERRIGAN, Judge.

No. 21091

HILDEGARD SCHOENAMSGRUBER,

vs.

"THE OAKLAND", etc.

No. 21092

GUSTAV SCHOENAMSGRUBER,

vs.

"THE OAKLAND", etc.

After hearing S. T. Hogevoll, Esq., and Emmett Burns, Esq., as Proctors for Libelant, and J. Hampton Hoge, Esq., Proctor for Respondent and Claim-

ant, and Counsel for each party consenting in open Court that the above entitled cases may be consolidated and tried together and as one case, it is so ordered. Further ordered that case No. 21092 be transferred from the calendar of the Hon. Frank H. Kerrigan to the calendar of the Hon. A. F. St. Sure.

Further ordered, after further hearing and Proctors for respective parties consenting, that the service of the citation upon the Libelees be and the same is hereby quashed as to each case and that alias citation issue in each case. [16]

[Title of Court and Cause.]

To the Honorable Judges of the District Court of the United States in and for the Northern District of California:

ANSWER.

No. 21091-S

Comes now the libelee The Motor Ship "The Oakland" her engines, boilers, etc. and the libelee The Hamburg American Line, a corporation, and preserving an exception to the jurisdiction of the court in personam over this answering libelee The Hamburg American Line and subject to this exception, libelees admit, deny and allege as follows:

I.

Answering paragraph II, deny each and every, all and singular the allegations therein contained and each and every part thereof.

II.

Answering paragraph IV, deny each and every, all and singular the allegations therein contained and each and every part thereof.

III.

Answering paragraph V, deny each and every, all and singular the allegations therein contained and each and every part thereof. [17]

IV.

Answering paragraph VI, deny each and every, all and singular the allegations therein contained and each and every part thereof.

V.

Answering paragraph VII, deny each and every, all and singular the allegations therein contained and each and every part thereof.

VI.

Answering paragraph VIII, deny each and every, all and singular the allegations therein contained and each and every part thereof.

Deny that the libelant has been damaged in the sum of Two Hundred and Fifty Thousand ($250,000.00) Dollars or any other sum or sums whatsoever or at all.

VII.

Answering paragraph X, deny each and every, all and singular the allegations therein contained and each and every part thereof.

VIII.

Answering paragraph XI, deny each and every, all and singular the allegations therein contained and each and every part thereof.

Deny that the libelant has been damaged in the sum of Two Hundred and Fifty Thousand ($250,000.00) Dollars or any other sum or sums whatsoever or at all.

Further answering said libel and as and for a SECOND, SEPARATE and DISTINCT DEFENSE THERETO, libelees allege as follows:

I.

That on or about the 30th day of October, 1929, in the [18] City of Hamburg, Germany, libelees entered into a written contract with the mother of said libelant, Mrs. Gustav Schoenamsgruber, for the carriage of said libelants from the City of Hamburg, Germany, to the City and County of San Francisco, California, United States of America; that under and by virtue of the terms of said contract it was provided among other things as follows:

> "§18. Complaints based on failure to fulfill the terms of this contract, claims for damages, etc. on the part of the passenger must be filed with the representative (agent) of the Hamburg-American Line at the port of destination immediately after the arrival of the ship. In the event that an agreement cannot be reached, both parties agree to refer the matter to the German Consul at the port of destination whose decision will be acceptable to both parties, subject to the laws applicable thereto."

That in violation of the terms of said contract, said libelants wholly failed and neglected to file with said representative or any representative of said libelees or with the German Consul any complaint based on the alleged failure to fulfill the terms of said contract, or any complaint of any nature whatsoever within the time provided in said contract or at all; that in violation of the terms of said contract libelants wholly failed and neglected to file with said representative or any representative of said libelees or with the German Consul any claim for damages or any other claim by reason of any alleged violation of the terms of said contract within the time provided by said contract of carriage.

Further answering said libel and as and for a THIRD, SEPARATE and DISTINCT DEFENSE THERETO, libelees allege as follows:

I.

That the contract of carriage hereinabove referred to was made and entered into in the City of Hamburg, Republic of Germany; that the law of the Republic of Germany governs the construction of said contract or any breach thereof. [19]

II.

That the law of the Republic of Germany which at all the times referred to in said libel was in full force and effect in the said City of Hamburg and at all other places in said Republic, and at the time and place of entering into said contract of carriage provided and did provide as follows:

Handelsgesetzbuch #474 to 904.

"#485. Der Reeder ist für den Schaden verantwortlich, den eine Person der Schiffsbesatzung einem Dritten durch ihr Verschulder in Ausfuhrung ihrer Dienstverrichtungen zufügt."

which translated into English reads:

"The carrier is liable for the damage which a member of the crew through any fault in discharging his professional duties inflicts upon a third party."

III.

Deny each and every, all and singular the allegations contained in paragraphs VI, VII, VIII and XI of said libel and in this regard libelees allege and aver that at all of said times set forth in said paragraphs VI, VII, VIII and XI the said chief cook was not engaged in the discharge of his professional duties.

Further answering said libel and as and for a FOURTH, SEPARATE and DISTINCT DEFENSE THERETO, libelees allege as follows:

I.

That said cause of action is barred by the Statute of Limitations.

Further answering said libel and as and for a FIFTH, SEPARATE and DISTINCT DEFENSE THERETO, libelee, the Hamburg American Line, a corporation, alleges as follows:

I.

That at all the times herein mentioned and at the time of the service of said libel, libelee, the Hamburg American Line, [20] was a foreign corporation engaging solely in foreign commerce and never at any time engaging in domestic commerce; that no officer or agent of said corporation was or has been served with process in this action.

II.

That prior to the filing of this libel, libelee agreed with said libelants that in the event libel was filed as a result of any claim which libelants might have, said libelee would appear in personam through service on the Secretary of State provided that libelants did not attach the Motor Ship "The Oakland" her boilers, tackle, etc. on any voyage. A copy of said stipulation is attached hereto, made a part hereof and marked Exhibit "A".

III.

That contrary to the terms of said stipulation said libelants attached the Motor Ship "The Oakland" her boilers, tackle, etc. and attempted to serve this libelee in personam by service on the Secretary of State.

IV.

That this court has not acquired jurisdiction and has no jurisdiction over this libel the Hamburg American Line, a corporation, by said alleged service.

WHEREFORE, libelees pray that libelants take nothing by their libel and libelees be dismissed with their costs.

J. HAMPTON HOGE,
Proctor for Libelees. [21]

San Francisco, May ....., 1931.

Felix M. Cunningham, Esquire, Attorney for Hilda Schoenamsgruber, and Mr. and Mrs. Schoenamsgruber, her parents:

In consideration of your refraining from libeling the Hamburg American Motorship Oakland by reason of any claim any of the above named persons may have against the said Motorship Oakland and/or the Hamburg American Line, her owner, until the said Motorship Oakland has passed out of the jurisdiction of the District Courts of the United States, the undersigned hereby irrevocably nominates and appoints the Secretary of State of the State of California its agent upon whom service may be made of any process in any libel in personam or in rem filed in admiralty in the District Court of the United States for the Northern District of California against the undersigned or the said Motorship, and further agrees in the event that a libel be filed in rem against the said Motorship Oakland in the absence of the said vessel from the port of San Francisco, for any such claim or claims, the undersigned will file in such libel proceeding a stipulation in admiralty in the usual form as a substitute for the said Motorship in the said proceeding.

The above agreement is made without admission of any claim against the said Company or the said Motorship and without waiver of defense of any kind or character whatsoever.

HAMBURG AMERICAN LINE,
By.....
its
and
By.....
Its Attorney. [22]

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO.—ss.

J. HAMPTON HOGE, being first duly sworn, deposes and says:

That he is the Proctor for the libelees named in the above entitled libel; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on information or belief and as to those matters that he believes it to be true; that affiant makes this verification in behalf of libelees since there is no officer of the libelee corporation, The Hamburg American Line, present in the City and County where affiant has his offices.

J. HAMPTON HOGE.

Subscribed and sworn to before me this 19th day of September, 1932.

[Seal] AMY B. TOWNSEND.
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Copy of the within answer received this 19th day of Sept. 1932.

VINCENT HALLINAN,
EMMETT BURNS,
S. T. HOGEVOLL,
Proctors for Libelant.

Filed Sep. 20, 1932. Walter B. Maling, Clerk.

[23]

[Title of Court and Cause.]

ANSWER.

No. 21092-S

To the Honorable Judges of the District Court of the United States in and for the Northern District of California:

Comes now the libelee the motor ship "The Oakland" her engines, boilers, etc., and the libelee The Hamburg American Line, a Corporation, and preserving an exception to the jurisdiction of the court in personam over this answering libelee The Hamburg American Line and subject to this exception, libelees admit, deny and allege as follows:

I.

Answering Paragraph I, deny each and every, all and singular the allegations therein contained and each and every part thereof.

II.

Answering Paragraph II, deny each and every, all and singular the allegations therein contained and each and every part thereof.

III.

Answering Paragraph IV, deny each and every, all and singular the allegations therein contained and each and every part thereof. [24]

IV.

Answering Paragraph VI, deny each and every, all and singular the allegations therein contained and each and every part thereof.

V.

Answering Paragraph VII, deny each and every, all and singular the allegations therein contained and each and every part thereof.

VI.

Answering Paragraph VIII, deny each and every, all and singular the allegations therein contained and each and every part thereof.

VII.

Answering Paragraph IX, deny each and every, all and singular the allegations therein contained and each and every part thereof.

VIII.

Answering Paragraphs X and XI, deny each and every, all and singular the allegations therein contained and each and every part thereof.

Deny that the libelant has been damaged in the sum of Fifty Thousand ($50,000.00) Dollars or any other sum or sums whatsoever or at all.

IX.

Answering Paragraph XII, deny each and every, all and singular the allegations therein contained and each and every part thereof.

Further answering said libel and as and for a second, separate and distinct defense thereto, libelees allege as follows:

I.

That on or about the 30th day of October, 1929, in the [25] City of Hamburg, Germany, libelees entered into a written contract with the wife of said libelant, Mrs. Gustav Schoenamsgruber, for the carriage of said libelants from the City of Hamburg, Germany, to the City and County of San Francisco, California, United States of America; that under and by virtue of the terms of said contract it was provided among other things as follows:

> "§18. Complaints based on failure to fulfill the terms of this contract, claims for damages, etc. on the part of the passenger must be filed with the representative (agent) of the Hamburg-American Line at the port of destination immediately after the arrival of the ship. In the event that an agreement cannot be reached, both parties agree to refer the matter to the German Consul at the port of destination whose decision will be acceptable to both parties, subject to the laws applicable thereto."

That in violation of the terms of said contract, said libelants wholly failed and neglected to file with said representative or any representative of said libelees

or with the German Consul any complaint based on the alleged failure to fulfill the terms of said contract, or any complaint of any nature whatsoever within the time provided in said contract or at all; that in violation of the terms of said contract libelants wholly failed and neglected to file with said representative or any representative of said libelees or with the German Consul any claim for damages or any other claim by reason of any alleged violation of the terms of said contract within the time provided by said contract of carriage.

Further answering said libel and as and for a THIRD, SEPARATE and DISTINCT DEFENSE THERETO, libelees allege as follows:

I.

That the contract of carriage hereinabove referred to was made and entered into in the City of Hamburg, Republic of Germany; that the law of the Republic of Germany governs the construction of said contract or any breach thereof. [26]

II.

That the law of the Republic of Germany which at all the times referred to in said libel was in full force and effect in the said City of Hamburg and at all other places in said Republic, and at the time and place of entering into said contract of carriage provided and did provide as follows:

Handelsgesetzbuch #474 to 904.

"#485. Der Reeder ist für den Schaden verantwortlich, den eine Person der Schiffs-

besatzung einem Dritten durch ihr Verschulder in Ausführung ihrer Dienstverrichtungen zufügt."

which translated into English reads:

"The carrier is liable for the damage which a member of the crew through any fault in discharging his professional duties inflicts upon a third party."

III.

Deny each and every, all and singular the allegations contained in Paragraphs VI, VII, VIII and XI of said libel and in this regard libelees allege and aver that at all of said times set forth in said Paragraphs VI, VII, VIII and XI the said chief cook was not engaged in the discharge of his professional duties.

Further answering said libel and as and for a FOURTH, SEPARATE and DISTINCT DEFENSE THERETO, libelees allege as follows:

I.

That said cause of action is barred by the Statute of Limitations.

Further answering said libel and as and for a FIFTH, SEPARATE and DISTINCT DEFENSE THERETO, libelee, the Hamburg American Line, a Corporation, alleges as follows:

I.

That at all the times herein mentioned and at the time of the service of said libel, libelee, the Ham-

burg American Line, [27] was a foreign corporation engaging solely in foreign commerce and never at any time engaging in domestic commerce; that no officer or agent of said corporation was or has been served with process in this action.

II.

That prior to the filing of this libel, libelee agreed with said libelants that in the event libel was filed as a result of any claim which libelants might have, said libelee would appear in personam through service on the Secretary of State provided that libelants did not attach the Motor Ship "The Oakland" her boilers, tackle, etc., on any voyage. A copy of said stipulation is attached hereto, made a part hereof and marked Exhibit "A".

III.

That contrary to the terms of said stipulation said libelants attached the Motor Ship "The Oakland" her boilers, tackle, etc., and attempted to serve this libelee in personam by service on the Secretary of State.

IV.

That this court has not acquired jurisdiction and has no jurisdiction over this libel the Hamburg American Line, a Corporation, by said alleged service.

WHEREFORE, libelees pray that libelants take nothing by their libel and libelees be dismissed with their costs.

J. HAMPTON HOGE,
Proctor for Libelees. [28]

San Francisco, May ....., 1931.

Felix M. Cunningham, Esquire,
Attorney for Hilda Schoenamsgruber,
and Mr. and Mrs. Schoenamsgruber, her parents:

In consideration of your refraining from libeling the Hamburg American Motorship Oakland by reason of any claim any of the above named persons may have against the said Motorship Oakland and/or the Hamburg American Line, her owner, until the said Motorship Oakland has passed out of the jurisdiction of the District Courts of the United States, the undersigned hereby irrevocably nominates and appoints the Secretary of State of the State of California its agent upon whom service may be made of any process in any libel in personam or in rem filed in admiralty in the District Court of the United States for the Northern District of California against the undersigned or the said Motorship, and further agrees in the event that a libel be filed in rem against the said Motorship Oakland in the absence of the said vessel from the port of San Francisco, for any such claim or claims, the undersigned will file in such libel proceeding a stipulation in admiralty in the usual form as a substitute for the said Motorship in the said proceeding.

The above agreement is made without admission of any claim against the said Company or the said Motorship and without waiver of defense of any kind or character whatsoever.

HAMBURG AMERICAN LINE

By.....

its

and

By.....

it Attorney. [29]

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO.—ss.

J. HAMPTON HOGE, being first duly sworn, deposes and says:

That he is the Proctor for the libelees named in the above entitled libel; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on information or belief and as to those matters that he believes it to be true; that affiant makes this verification in behalf of libelees since there is no officer of the libelee corporation, The Hamburg American Line, present in the City and County where affiant has his offices.

J. HAMPTON HOGE.

Subscribed and sworn to before me this 19th day of September, 1932.

[Seal] AMY B. TOWNSEND,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Copy of the within answer received this 19th day of September, 1932.

VINCENT W. HALLINAN,
EMMETT R. BURNS,
S. T. HOGEVOLL,
Proctors for Libelants.

Filed Sep. 20, 1932. Walter B. Maling, Clerk.

[30]

In the District Court of the United States in and for the Northern District of California, Southern Division.

In Admiralty.
No. 21091-S

HILDEGARD SCHOENAMSGRUBER, by Gustav Schoenamsgruber, her guardian ad litem,
Libelant,

vs.

THE MOTORSHIP "THE OAKLAND", her boilers, engines, etc.,

and

THE HAMBURG AMERICAN LINE, a Corporation,
Libelees.

No. 21092-S

GUSTAV SCHOENAMSGRUBER,

Libelant,

vs.

THE MOTORSHIP "THE OAKLAND", her engines, boilers, etc.,

and

THE HAMBURG AMERICAN LINE, a Corporation,

Libelees.

NOTICE OF ASSOCIATION OF PROCTORS.

To the libelants above named and to their counsel:

You and each of you will please take notice that we have associated the firm of DERBY, SHARP, QUINBY & TWEEDT as our proctors herein with J. HAMPTON HOGE, ESQ., and that said J. Hampton Hoge, Esq., and said Messrs. Derby, Sharp, Quinby & Tweedt are our proctors herein.

HAMBURG AMERICAN LINE,
By Harold H. Ebey.

CONSENT TO ASSOCIATION.

We hereby consent to and approve the above association.

J. HAMPTON HOGE,
DERBY, SHARP, QUINBY
& TWEEDT.

Receipt of a copy of the above notice of association of proctors is hereby acknowledged this 18th day of September, 1933.

EMMETT BURNS,
VINCENT W. HALLINAN,
S. T. HOGEVOLL,
Proctors for Libelants.

[Endorsed]: Filed Sep. 18, 1933. Walter B. Maling, Clerk. [31]

In the District Court of the United States in and for the Northern District of California, Southern Division.

In Admiralty.
No. 21091-S

HILDEGARD SCHOENAMSGRUBER, by Gustav Schoenamsgruber, her guardian ad litem,
Libelant,

vs.

THE MOTORSHIP "THE OAKLAND", her boilers, engines, etc.,

and

THE HAMBURG AMERICAN LINE, a Corporation,
Libelees.

No. 21092-S

GUSTAV SCHOENAMSGRUBER,

Libelant,

vs.

THE MOTOR SHIP "THE OAKLAND", her engines, boilers, etc.,

and

THE HAMBURG AMERICAN LINE, a Corporation,

Libelees.

AFFIDAVIT OF EMIL A. WINKLER IN SUPPORT OF MOTION TO REFER CASES TO ARBITRATION.

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO.—ss.

EMIL A. WINKLER, being first duly sworn, deposes and states as follows: He is the Pacific Coast Manager of the Hamburg American Line, Libelee herein, and makes this affidavit on behalf of the libelees herein.

The libel herein sets forth causes of action justiciable in admiralty within the meaning of section 8 of the "United States Arbitration Act" (9 U. S. Code §§1-15) and is based [32] upon maritime transactions as defined in §1 of said Act, to-wit, is based upon a matter in foreign commerce consisting of a maritime contract entered into on or about the 30th day of October, 1929, in the City of Hamburg, Germany, between the wife of said libelant, to-wit, Mrs. Gustav Schoenamsgruber, and the libelees

herein, said contract providing for the carriage of libelants herein from the City of Hamburg, Germany, to the City of San Francisco, United States of America, by vessel.

Said contract contains a written provision requiring said parties thereto to arbitrate any controversy arising out of said contract or transaction. Said provision reads as follows:

> "§18. Complaints based on failure to fulfill the terms of this contract, claims for damages, etc. on the part of the passenger must be filed with the representative (agent) of the Hamburg American Line at the port of destination immediately after the arrival of the ship. In the event that an agreement cannot be reached, both parties agree to refer the matter to the German Consul at the port of destination whose decision will be acceptable to both parties, subject to the laws applicable thereto."

Affiant is informed and believes and on such information and belief alleges that there is a German Consul at the port of San Francisco able and willing to pass upon the matters in controversy herein and libelees herein are willing to submit said matters to said German Consul for arbitration and have not refused nor otherwise placed themselves in default in proceeding with such arbitration, but at all times have been and still are willing to proceed with such arbitration.

The original of said contract was until recently in the offices of libelees in Germany. In order to

produce and authenticate the same, libelees noticed the depositions of witnesses in Germany. Said depositions have been taken, and affiant [33] is informed and believes, and therefore alleges, that said original is annexed to said depositions and that said depositions (together with said contract) have been duly forwarded to this court for filing.

Libelants have not made any motion for an order directing these cases to be referred to arbitration as required by said contract, nor have libelees made any such motions prior to the one now pending. Libelees have not made such motion earlier for the reason that they have been awaiting the return of said depositions containing said contract and testimony duly identifying and authenticating it.

EMIL A. WINKLER.

Subscribed and sworn to before me this 6th day of September, 1933.

[Seal] AMY B. TOWNSEND,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Copy of the within not. mot. to refer case to arbitrator, etc., received this 6 day of September, 1933.

VINCENT W. HALLINAN,
S. T. HOGEVOLL,
Proctors for Libelants.

Filed Sep. 6, 1933. Walter B. Maling, Clerk.

[34]

[Title of Court and Cause.]

AFFIDAVIT OF E. BARON VON BERCHEN.

No. 21091-S

No. 21092-S

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO.—ss.

E. BARON VON BERCHEN, being first duly sworn, deposes and states as follows: He is the Consul representing the German Government in the port of San Francisco, California. He has the title of Vice-Consul and is the German Consul now acting at the port of San Francisco, California, and in charge of the office of the German Consul at said port, with full authority and jurisdiction from the German Government to act as such German Consul. [35]

Affiant has been informed that a motion has been made to refer to the German Consul at San Francisco, California, a certain controversy, complaint or claim in connection with the above designated libels and affiant is ready and willing to act as such arbitrator should the court order any such matter referred to him for such arbitration.

E. BARON VON BERCHEN.

Subscribed and sworn to before me this 23 day of September, 1933.

[Seal] JOSEPH GOUTTE,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Sep. 25, 1933. Walter B. Maling, Clerk. [36]

[Title of Court and Cause.]

AFFIDAVIT OF J. HAMPTON HOGE IN SUPPORT OF MOTION TO REFER TO ARBITRATOR.

No. 21091-S
No. 21092-S

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO.—ss.

J. HAMPTON HOGE, being first duly sworn, deposes and says: He is one of the proctors for the libelees herein and makes this affidavit on their behalf.

The libels herein purport to set forth causes of action justiciable in admiralty within the meaning of section 8 of the "United States Arbitration Act" (9 U. S. Code, §§1-15) and [37] are based upon a maritime transaction as defined in section 1 of said Act, to-wit, are based upon a matter of foreign commerce consisting of a maritime contract, which is alleged in the libels to have been entered into on or about the 30th day of October, 1929, in the City of Hamburg, Germany, but which (affiant is informed and believes) was actually entered into on the 12th day of October, 1929, between libelees herein on the one hand and on the other hand by Mrs. Lieschen Schoenamsgruber, who is the mother of libelant Hildegard Schoenamsgruber and the wife of libelant Gustav Schoenamsgruber.

Affiant has in his possession a photostat, which photostat (as affiant is informed and believes and

therefore alleges) is a true and correct photostatic copy of said contract entered into in Hamburg, Germany. A true and correct photostatic copy of said contract is annexed hereto as Exhibit "A" and by this reference expressly incorporated as a part of this affidavit to all intents and purposes as if herein set out in full.

Said contract provides for the carriage of Mrs. Lieschen Schoenamsgruber and said Hildegard Schoenamsgruber from the City of Hamburg, Germany, to the City of San Francisco, United States of America, by the libelee motorship "Oakland", a vessel of the libelee Hamburg American Line.

Said contract at the time of its execution was printed in the German language and (as affiant is informed and believes and therefore alleges) said Mrs. Lieschen Shoenamsgruber at the time of executing said contract was able to read, write and understand the German language.

Said contract contains a written provision requiring the parties to arbitrate claims for damages or complaints [38] based on failure to fulfill the terms thereof. Said provision is paragraph eighteen (18) of said contract and a true and correct translation thereof (as affiant is informed and believes) is as follows:

> Complaints with respect to failure to fulfill this contract, claims for damages etc. must be presented by the passenger immediately after arrival at the overseas port of destination to the agent of the Hamburg-American Line. In

the event an agreement cannot be reached thereby, then the decision of the German Consul acting at the port of disembarkation shall be final and his decision shall be accepted, both parties waiving recourse to the courts of law.

There is a German Consul at the port of San Francisco able and willing to pass upon the matters in controversy herein and libelees herein are willing to submit said matters to said German Consul for arbitration and have not refused nor otherwise placed themselves in default in proceeding with such arbitration, but at all times have been and still are willing to proceed with such arbitration.

The original of said contract was until recently in the offices of libelees in Germany. In order to produce and authenticate the same, libelees noticed the depositions of witnesses in Germany. Said depositions have been taken and affiant is informed and believes and therefore alleges, that said original is annexed to said depositions and that said depositions (together with said contract) have been duly forwarded to this court for filing.

Libelants have not made any motion for an order directing these cases to be referred to arbitration as required by said contract, nor have libelees made any such motions prior to the one now pending. Libelees have not made such motion earlier for [39] the reason that they have been awaiting the return of said depositions containing said contract and testimony duly identifying and authenticating it,

and have only recently obtained copies of said depositions.

J. HAMPTON HOGE.

Subscribed and sworn to before me this 22 day of September, 1933.

[Seal] AMY B. TOWNSEND,
Notary Public in and for the City and County of San Francisco, State of California. [40]

[Endorsed]: Filed Sep. 25, 1933. Walter B. Maling, Clerk. [41]

[Title of Court and Cause.]

AFFIDAVIT OF JOHN D. SCHROEDER.

No. 21091-S
No. 21092-S

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO.—ss.

JOHN D. SCHROEDER, being first duly sworn, deposes and states as follows: He is the official translator of the German language for the Superior and Municipal Courts in the City and County of San Francisco and for the past twenty-five years has been engaged in translating documents from the German language into English and in translating the testimony of witnesses speaking in German and has been so engaged in all the courts in the City [44] and County of San Francisco.

Affiant was born and educated in Germany.

Affiant has read clause No. 18 of the contract of transportation purported to have been issued by the

Hamburg-Amerika Linie, Hamburg

Nicht übertragbar.

Kammer No. 40 a-c

Beförderungs-Vertrag Dritter Klasse M 488

Liste 1 No. 9-10

Zwischen der Hamburg-Amerika Linie und dem unterzeichneten Reisenden (bei Familien als Familienvorstand) ist der nachstehende Beförderungs-Vertrag geschlossen worden:

§ 1. Die Hamburg-Amerika Linie übernimmt die Beförderung der in § 3 dieses Vertrages benannten Reisenden in der dritten Klasse ihres Dampfers

Oakland von Hamburg nach San Francisco und von

Staat:

per Eisenbahn bezw. mit Dampfschiff weiter nach:

§ 2. Während der Seefahrt erhalten die Reisenden die durch die gesetzlichen Bestimmungen vorgeschriebene Verpflegung. Die Verpflegung beginnt am Abfahrtstage nach erfolgter Anbordnahme der Reisenden und endet mit deren Vonbordgehen überseeischen Ausschiffungshafen.

§ 3. Der Fahrpreis ist wie folgt vereinbart worden:

Vor- und Familiennamen der Reisenden und der mit den reisenden Familienangehörigen	Alter	Familienstand (ob Vater, Mutter, Ehefrau, Tochter oder Ihre Familienangehörige, ob verheiratet, ledig)	Bisheriger Wohnort	Fahrpreis für Reisende ab Hamburg M	Pf.	Weiterbeförderung M	Pf.
Liesbeth Schiemanegräber	29	verh.	Krainhagen				
Hildegard "	6	l.	"				
			im ganzen M	551		297	

Das von der amerikanischen Regierung verlangte Kopfgeld von Dollar 8.– ist für Reisende entrichtet mit Dollar

§ 4. Außer dem vorstehend bezeichneten Preise ist für Beförderung, Beköstigung oder Unterbringung von Hamburg bis zum außereuropäischen Ausschiffungshafen nichts mehr zu bezahlen; es sei denn, daß für Gepäck Überfracht laut § 13 dieses Vertrages oder Transportgebühren von der Bahn zur Gepäckverladestelle zu entrichten wären. Die Aufenthaltskosten in Hamburg vom Eintreffen des Reisenden bis zu der in diesem Vertrage festgesetzten Abfahrtsstunde des Schiffes sind zu Lasten des Reisenden.

§ 5. Die Beförderung zum Dampfer findet statt von der Gepäckhalle der H. P. A. am Hauptbahnhof am 12. Okt. 1929 um 15 Uhr.

Die Reisenden haben sich pünktlich zur Einschiffung einzufinden; das Ausbleiben eines Reisenden zur festgesetzten Abfahrt zieht den Verlust des halben Schiffsfahrgeldes nach sich.

Fortsetzung des Vertrages auf der Rückseite.

Fortsetzung des Vertrages.

§ 16. Sollte vorstehende Abfahrt verschoben werden oder ausfallen, oder sollte bei ehemaliger Weiterbeförderung in der Weiterbeförderung von außereuropäischen Ausschiffungshäfen ohne Schuld des Reisenden eine Verspätung eintreten, so wird dem Reisenden entweder an Bord des Schiffes oder in einem Auswandererlogierhause oder, wo solches nicht vorhanden, in einem geeigneten Gasthause während der Verhinderung ohne besondere Vergütung Unterkunft und Verpflegung gewährt. Falls die Verspätung länger als 7 Tage dauert, hat der Reisende das Recht, von dem Vertrage zurückzutreten und die Rückerstattung des für die noch nicht angefangenen Strecke gezahlten Fahrpreises zu verlangen, unbeschadet der ihm nach dem bürgerlichen Rechte zustehenden Ansprüche auf Schadenersatz.

§ 17. Falls der Reisende oder einer der ihn begleitenden Familienangehörigen vor Antritt der Seereise stirbt oder nachweislich durch Krankheit oder sonstige außer seiner Macht liegende Zwischenfälle am Antritt der Weiterreise verhindert ist, wird der für die Weiterbeförderung gezahlte Preis dem Reisenden bzw. seinen Hinterbliebenen auf Wunsch unverkürzt zurückgezahlt, und gilt dieser Vertrag in solchem Falle als nur für die Beförderung von Hamburg nach dem außereuropäischen Ausschiffungshafen geschlossen. Sollte der Reisende an überseeischen Landungshäfen von der Weiterbeförderung aus anderen Gründen zurücktreten wollen, so wird ihm der für die Weiterfahrt erhaltene Betrag abzüglich zehn Prozent zurückgegeben.

§ 18. Während der Seereise erhält jeder über 10 Jahre alte Reisende (oder je 2 Kinder unter 10 Jahren) ein Bett in einer zwei- bis vierbettigen Kammer zur Benutzung überwiesen. Es werden während der Seefahrt außerdem 3 tägliche Mahlzeiten verabreicht, wenn das nötige Eß- und Trinkgeschirr den Reisenden unentgeltlich zur Verfügung gestellt wird. Das silberblanke Tisch- und Wandbesteck sowie Waschgelegenheit wird [illegible] gestellt.

§ 19. Während der Seefahrt etwa erkrankten Reisenden werden die nötigen Medizinen und Dienste unentgeltlich gewährt.

§ 20. Das Gepäck des Reisenden ist an dem Gepäckbureau der Hamburg-Amerika Linie, Hamburg, abzuwiegen bzw. abzufertigen, und zwar so zeitig, daß es spätestens drei Tage vor Abfahrt im Gepäckschuppen zur Abfertigung bereit ist. Gegen Vorzeigung des Beförderungsvertrages und Zahlung erfolgt [illegible] wird dem Reisenden in der Gepäckhalle ein Gepäckschein ausgehändigt, und mit Entgegennahme des letzteren ist die Verladung vollzogen. Die Gewähr für die Verladung des Gepäcks mit demselben übernehmen, wohnen die Reisende benutzt, übernimmt die Hamburg-Amerika Linie nur, wenn ein Gepäckschein, wie vorstehend, erteilt worden ist.

§ 21. Die Gesellschaft befördert für jeden vollzahlenden Reisenden 100 Kilogramm Reisegepäck während der Seefahrt frei, für Kinder von 1–10 Jahren die Hälfte. Mehr oder in Anbetracht dessen für beschädigtes oder abhanden gekommenes Gepäck in keinem Falle mit mehr als $ 25.–, gleichviel, ob ein wertiger Verlust oder eine wertige Beschädigung durch Verschulden der Gesellschaft, eines ihrer Vertreter oder Angestellten oder durch irgendeine andere Ursache entstehen sollte. Wird vom Reisenden eine $ 25.– übersteigende Haftsumme gewünscht, so hat der Reisende diese durch eine besondere Versicherung zu decken.

§ 22. Wertige Gepäckbeförderung auf dem Seeschiffe wird mit $ 4.– per 100 Kilogramm berechnet.

§ 23. Die gewährenden Eisenbahnen befördern an Gepäck 150 Pfund englisch auf die Fahrkarte einer erwachsenen Person frei; für wertige Effekten ist auch die Frachtzahlung der betreffenden Bahn zu zahlen. Die Gesellschaft hat die Gepäckbeförderung über den außereuropäischen Ausschiffungshafen hinaus nicht mit übernommen.

§ 24. Die Hamburg-Amerika Linie erklärt sich bereit, wenn gewünscht, das Gepäck auf Kosten des Reisenden gegen jeglichen Schaden zu versichern.

§ 25. Alles Reisegepäck muß mit dem vollen Namen des Reisenden deutlich und dauerhaft bezeichnet sein.

Kostbarkeiten, Gelder, Wertpapiere, Juwelen oder sonstige wertvolle oder zollpflichtige Gegenstände dürfen sich nicht im Gepäck befinden, und erklärt sich die Gesellschaft für solche Artikel frei von jeglicher Verantwortlichkeit. Wertsachen können aber, versiegelt und mit dem vollständigen deutlich geschriebenen Namen des Eigentümers versehen, dem Zahlmeister zur Aufbewahrung während der Fahrt eingehändigt werden, jedoch ohne Haftpflicht der Gesellschaft. Wein, Bier, Spirituosen und dgl. Getränke darf niemand mitbringen; solche sind zu den festgesetzten Preisen für jedermann an Bord zu kaufen. Ebenso ist die Mitnahme von feuergefährlichen, leicht entzündlichen und ähnlichen Gegenständen strengstens untersagt. Zuwiderhandelnde werden für allen Schaden haftbar gemacht und gerichtlich zur Verantwortung gezogen.

Den Reisenden wird es dringend anempfohlen, beim Verlassen des Schiffes ihr Handgepäck bei sich zu behalten, und darauf zu achten, daß sie auch ihr übriges Gepäck sofort richtig wiederbekommen.

Etwaige Gepäckforderungen, Verlust- oder Schadensansprüche und spätestens 14 Tage nach Landung des Reisenden beim Dockinspektor oder bei der Vertretung der Hamburg-Amerika Linie schriftlich einzureichen. Wenn der Reisende solchen zu tun unterläßt, wird die Gesellschaft von jeder Verantwortlichkeit für Verlust oder Beschädigung des Gepäcks, welcher dessen Ursache auch sein mag, hierdurch ausdrücklich entbunden.

Sollten die Reisenden durch irgendwelchen Umstand gezwungen sein, Gepäck mit einem der nächsten Schiffe nachsenden zu lassen, müssen sie sich sofort nach ihrer Ankunft bei dem Dockinspektor am Landungsplatz der Dampfschiffe oder bei der Vertretung der Hamburg-Amerika Linie melden und aufgeben, was nach Eintreffen des Gepäcks damit geschehen soll. — Es wird darauf aufmerksam gemacht, daß nur wirklich gebrauchte Reisegegenstände, als: Kleidungsstücke, Hausstandsgeräte, Betten, Wäsche, Werkzeug, Bücher und dgl. zollfrei eingeführt werden dürfen, dagegen aber sämtliche neuen Gegenstände dem gewöhnlichen Eingangszoll unterworfen sind und daher vor Ankunft dem Zahlmeister jedenfalls genau und gewissenhaft angegeben werden müssen, damit er sie im Manifest mit aufführen kann. Falls die Reisenden falsche Angaben darüber machen oder zollpflichtige Gegenstände verheimlichen, setzen sie sich der Gefahr aus, daß ihre sämtlichen Gegenstände beschlagnahmt werden.

§ 17. Wenn das Schiff unterwegs durch einen Seeunfall oder einen sonstigen Umstand an der Fortsetzung der Reise verhindert oder so [illegible] Unterbrechung derselben genötigt werden sollte, wird den Reisenden ohne [illegible] vergütung angemessener [illegible] und die Beförderung der Reisenden und ihres Gepäcks nach dem Bestimmungsorte so bald als möglich herbeigeführt.

§ 18. Streitigkeiten über mangelhafte Erfüllung dieses Vertrages, Schadenersatzansprüche usw. seitens des Reisenden sind alsbald nach Ankunft im überseeischen Landungshafen bei der Vertretung der Hamburg-Amerika Linie anzubringen. Sollte hier eine Einigung nicht erzielt werden können, so ist der Anspruch des im Ausschiffungshafen wohnenden deutschen Konsuls maßgebend, dessen Entscheidung sich beide Teile unter Verzicht auf Anrufung der ordentlichen Gerichte unterwerfen.

§ 19. Dieser Vertrag bleibt in den Händen des Reisenden.

§ 20. Die Reisenden verpflichten sich, während der Seereise den Anordnungen des Kapitäns oder dessen Vertreters unbedingt Folge zu leisten.

§ 21. Jeder Reisende hat sich mit genügenden Mitteln zu versehen, um bei der Ankunft im außereuropäischen Ausschiffungshafen während der Untersuchung durch die Behörde für seinen Unterhalt selbst aufkommen zu können.

§ 22. Dieser Vertrag ist zum Zeichen des Einverständnisses von dem Reisenden unterschrieben und von seiten der Hamburg-Amerika Linie mit ihrem der Unterschrift gleichwertigen Stempel versehen worden.

Hamburg, den 19

Hamburg-Amerika Linie

Vertretung in San Francisco, Cal.:
Hamburg-American Line, United American Lines, Inc., General Agents,
374, Market Street

Vertretung in Los Angeles, Cal.:
The Los Angeles Steamship Co.,
108, W. 6th Street.

[illegible]

(Unterschrift des Reisenden)
(Bei Familien der Familienvorstand)

Hamburg American Line at Hamburg, Germany, under date of October 12, 1929, which contract is numbered 468 and is purported to be signed by Lieschen Schoenamsgruber.

Said clause No. 18 reads in German as follows:

> Beschwerden über mangelhafte Erfüllung dieses Vertrages, Schadenersatzansprüche usw. seitens des Reisenden sind alsbald nach Ankunft im überseeischen Landungshafen bei der Vertretung der Hamburg-Amerika Linie anzubringen. Sollte hier eine Einigung nicht erzielt werden können, so ist der Ausspruch des im Ausschiffungshafen wohnenden detutschen Konsuls massgebend, dessen Entscheidung sich beide Teile unter Verzicht auf Anrufung der ordentlichen Gerichte unterwerfen.

A true and correct translation of said clause No. 18 from the German language to the English language is as follows:

> Complaints with respect to failure to fulfill this contract, claims for damages etc. must be presented by the passenger immediately after arrival at the overseas port of destination to the agent of the Hamburg-American Line. In the event an agreement cannot be reached thereby, then the decision of the German Consul acting at the port of disembarkation shall be final and his decision shall be accepted, both parties waiving recourse to the courts of law.

JOHN D. SCHROEDER.

Subscribed and sworn to before me this 22nd day of September, 1933.

[Seal] KATHRYN E. STONE,
Notary Public in and for the City and County of San Francisco, State of California. [45]

[Endorsed]: Receipt of a copy of the within affidavit of Schroeder is hereby acknowledged this 25th day of September, 1933.

VINCENT W. HALLINAN,
EMMETT R. BURNS,
Proctors for Libelees.

Filed Jan. 29, 1934. Walter B. Maling, Clerk. [46]

[Title of Court and Cause.]

AFFIDAVIT OF EMMETT R. BURNS.

No. 21091-S
No. 21092-S

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO.—ss.

EMMETT R. BURNS, being first duly sworn, on information and belief, deposes and states as follows:

That he is one of the attorneys of record in the above-entitled action and is familiar with all the facts therein and makes this affidavit on behalf of the libelants above named;

That he has read the affidavit of EMILE WINKLER submitted on this motion on behalf of libelees;

that in the said affidavit of Emile Winkler it is stated, on oath, that the contract of passage was entered into [47] on or about the 30th day of October, 1929, in the City of Hamburg, Germany, between the wife of said libelant, to-wit, MRS. LOUISE SCHOENAMSGRUBER, and the libelees herein; that it is affirmed in the said affidavit of Emile Winkler that the contract contained written provisions requiring the parties to arbitrate;

That your affiant is informed and believes that the said statements that the contract was made on the 30th day of October, 1929, in the City of Hamburg, Germany, are false and untrue. He further deposes and states upon information and belief that the said contract was not made between MRS. LOUISE SCHOENAMSGRUBER and the libelees, and that there never was a contract between the said MRS. LOUISE SCHOENAMSGRUBER and the libelees, and in support of this contention your affiant herewith submits to the court the original contract signed by the agents of the HAMBURG AMERICAN LINE, printed upon a regular contract form of the HAMBURG AMERICAN LINE, bearing contract number 551997, contracting to carry MRS. LOUISE SCHOENAMSGRUBER and HILDEGARD SCHOENAMSGRUBER from Hamburg, Germany to San Francisco, California; that the said contract was made in the City of San Francisco, State of California, on the 22nd day of July, 1929; that the said document is the original document signed by A. G. B. KNUTH as agent for the HAMBURG AMERICAN LINE and the

UNITED AMERICAN LINES, their general agents; that affiant deposes and states that the said contract could not have been made with MRS. LOUISE SCHOENAMSGRUBER on the 30th day of October, 1929, for the said motorship "The Oakland", affiant is informed and believes, was then upon the high seas, having sailed from Hamburg, Germany, prior thereto, as will be shown by the stamp of the HAMBURG AMERICAN LINE on the departure card which will be submitted to the court.

Upon a reading of said contract, which will be submitted to this court, we submit that the court will find that there is no provision for arbitration. Further, the said affiant is of the opinion and firmly believes that the said statements are contained in the said affidavit for the sole and exclusive purpose of circumventing the law [48] as laid down in the Oceanic Steamship Navigation Company v. Corcoran, 9 Fed. (2d) 724, and for the purpose of cercumventing the case known as The Kensington, 183 U. S. 263; 46 Law Edition 190, wherein the law is laid down that whenever a contract is made in the United States, then the courts of the United States are bound only by the American law regardless of any provision to the contrary in the contract between the parties.

That the statement in the affidavit of said Emile Winkler, on page 2 thereof, that "the original said contract was until recently in the offices of libelees in Germany", is false and untrue;

That in addition thereto, your affiant has read the affidavit of J. HAMPTON HOGE, one of the attorneys in this case; that the said statement that the contract was entered into on the 12th day of October, 1929, is false and untrue; that the statement that the said contract was entered into between the libelees and MRS. LOUISE SCHOENAMSGRUBER, is false and untrue; that the statement that the said contract was printed in the German language, is false and untrue, as the court will find that the original contract, which libelants will submit to the court, is printed in the English language and entered into on the 22nd day of July, 1929; that the said statement in the affidavit of J. HAMPTON HOGE, that the contract provides for arbitration between the parties to this action will be found by the court, on examination of the original contract, to be untrue; that the said contract contains no such provision as Number 18, but contains seven (7) provisions numbered with arabic numerals; that the statement on page 3 of J. Hampton Hoge's affidavit, that there is now a German Consul at the port of San Francisco, is false and untrue; that the statement in J. Hampton Hoge's affidavit, that the original of said contract was until recently in the offices of libelees in Germany, is false and untrue;

That he, your affiant, has read the affidavit of E. BARON VON BERCHEN, and submits that the said Baron Von Berchen is not the German Consul, but is an assistant to the German Consul; that

there is not now a German Consul in the city or district of San Francisco, California. [49]

Affiant herewith submits with this motion a copy of the provisions contained in the said contract between the HAMBURG AMERICAN LINE and the libelants.

Further, the affiant is informed by MRS. LOUISE SCHOENAMSGRUBER, not a party to this action, and GUSTAV SCHOENAMSGRUBER, that no money was paid to the HAMBURG AMERICAN LINE in Germany at any port for the passage of MRS. LOUISE SCHOENAMSGRUBER or HILDEGARD SCHOENAMSGRUBER, but that the said money was paid to the HAMBURG AMERICAN LINE at the time the contract was made in the City of San Francisco, State of California, on the 22nd day of July, 1929.

Your affiant, upon information and belief, further states that the said exhibits attached to the affidavit of J. HAMPTON HOGE, alleged by them to be a contract containing twenty-two (22) provisions, has been fully interpreted to him by GUSTAV SCHOENAMSGRUBER and MR. HESTAL, a duly-licensed and practising attorney in the State of California who has resided in and studied in Germany and who is fully familiar with the various dialects of the German language, and your affiant is informed by both of said persons that there is no provision in the said exhibits attached to the affidavit of J. HAMPTON HOGE which refer to personal injuries or to wilful in-

juries of any passenger, and that section 18 refers solely to the provisions as contained in the exhibits attached to the affidavit of J. HAMPTON HOGE, referred to by them as a so-called contract, and he further avers that the said exhibits do not bear any date on which it is alleged this supposed contract was entered into and that as required in section 22 of the said exhibit there is no affixing of the seal of the HAMBURG AMERICAN LINE, ,under which circumstances they would not be bound, so that the same was and is not a contract at all, because it bears no date and it is not agreed to by both parties.

EMMETT R. BURNS.

Subscribed and sworn to before me this 2nd day of October, 1933.

[Seal] THOMAS A. DOUGHERTY,
Notary Public in and for the City and County of San Francisco, State of California. [50]

[Title of Court and Cause.]

AFFIDAVIT OF
LOUISE SCHOENAMSGRUBER.

No. 21091-S
No. 21092-S

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO.—ss.

LOUISE SCHOENAMSGRUBER, being first duly sworn, deposes and says:

That she did not contract for passage of Hildegard Schoenamsgruber, her minor child, from Hamburg, Germany, to San Francisco, California, and she never paid any passage for the transportation of herself and her minor child, Hildegard Schoenamsgruber, from Hamburg, Germany, to San Francisco, California, on the voyage of October, 1929, in the Hamburg American Motorship "The Oakland"; that to the best of her knowledge, Hildegard Schoenamsgruber never signed any agreement prior to the voyage [51] of October, 1929, on the above-named motorship.

LIESCHEN SCHOENAMSGRUBER.

Subscribed and sworn to before me this 2nd day of October, 1933.

[Seal] THOMAS A. DOUGHERTY,
Notary Public in and for the City and County of San Francisco, State of California. [52]

[Title of Court and Cause.]

AFFIDAVIT OF
GUSTAV SCHOENAMSGRUBER.

No. 21091-S
No. 21092-S

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO.—ss.

GUSTAV SCHOENAMSGRUBER, being first duly sworn, deposes and says:

That he paid the sum of three hundred and eight (308) dollars to THE HAMBURG AMERICAN

LINE in 1929, which amount he had saved for the transportation of his wife and child from Hamburg, Germany, to San Francisco, California; that in return he received a contract entered into in San Francisco and dated July 22, 1929, being a printed contract of the Hamburg American Line; that Anna Lange acted in his behalf in his presence, as your affiant could not at that time talk or understand the English language to any extent. [53]

That he has seen and read the photostatic copies (covering two pages) attached to the affidavit of J. HAMPTON HOGE, which purports to be a copy which libelees allege is a contract for the contract of passage, between LOUISE SCHOENAMSGRUBER, not a party to this action, and the HAMBURG AMERICAN LINE; that this provision was never seen by him, was never acquiesced in by him, and that he has read the entire exhibits, including section number 18.

That the exhibits interpreted briefly amounts to the following:

Section 1. (Page 1 of exhibit.) That the passenger travels on the Hamburg American Line, third class, on the boat Oakland from Hamburg to San Francisco;

Section 2. (Paragraph 2.) Provides that the passengers are provided all of their food during the time of the voyage on the Hamburg American Line, from the first traveling date until the last date of disembarking.

Section 3. Enumerates the price.

Section 4. Provides that there shall be no further charges unless there is an excess of baggage as is provided for in paragraph 13, and if the passengers require anything before embarking, that that shall be to their own account.

Section 5. Provides that if you are not on board the ship at the fixed time of voyage, then the passenger shall lose one-half of the price of the voyage.

Section 6. Provides that in case the date of sailing is postponed by the company, then the company shall provide a place for the passengers to reside, at the company's cost, and that in the event the period is longer than seven (7) days, then the passenger is entitled to a full refund of their money.

Section 7. Provides that in case of illness of the proposed passenger prior to the sailing date, then the company, upon proper notice, will refund the full amount of passage paid and that in the event that the inability of passenger to make the voyage [54] is due to anything other than illness, then the passenger shall only be entitled to one-half of the voyage value.

Section 8. Provides that in the event of a stopover at any port the passenger becomes ill and is unable to continue on the voyage, then the company shall refund to the passenger the value of the voyage from that port to the point of disembarkation, and that in the event that the passenger does not desire to continue the voyage at any foreign port other than in Germany, then the company shall refund to the passenger the amount of value of the voyage

from that port to the port of disembarkment, less ten (10) percent.

Section 9. Provides that every person over ten (10) years of age shall have a single bed and under ten (10) years of age there shall be two (2) children to a bed, and each passenger shall receive three (3) meals a day and sufficient water to drink and bathe in.

Section 10. Provides for medical care in case of illness while on a voyage.

Section 11. Provides that baggage must be delivered to the company at Hamburg prior to the date of sailing, and that the passenger shall receive, in return, a receipt for the said baggage; that unless specially requested, the company does not guarantee that the baggage will be on the particular boat that the passenger travels on.

Section 12. Each grown passenger shall be allowed two hundred (200) pounds of baggage, children one-half of that amount. In case of any damage to the baggage, the highest amount the company will be responsible for will be twenty-five (25) dollars a person. If the value of the baggage is over twenty-five (25) dollars, then the passenger must insure it; otherwise, the company will not be responsible.

Section 13. Provides the rate of charge for all excess baggage. [55]

Section 14. Provides the amount of baggage for which the American railroads will be allowed to

carry free upon their tickets, and states that anything in excess must be paid for by the passenger.

Section 15. That if you so request, the Hamburg American Line will insure all baggage.

Section 16. Provides that all baggage must bear the full and legible name of the passenger and further provides that all jewels and valuables must not be contained in the baggage, otherwise the company will not be responsible for same. The company further provides a place for safe keeping for jewels and valuables and in all events the company will not be responsible for jewels and valuables. And further provides that no passenger shall be allowed to take on board any intoxicating beverages and liquors as the company provides the same on board the vessel. No passenger shall take on board with him any explosive or inflammable substance and any violation of this provision will be legally punished. All things for the personal care of the person should be carried in their handbag so that it may be readily available. In case of a loss of any baggage, the passenger must report it fourteen (14) days after landing, otherwise the company will not be responsible. Baggage which is carried upon the boat other than a boat in which the passenger travels may be claimed upon proper showing of the passenger at any time and all bedding and household goods there shall be no tariff charges on. All goods and matter carried in a baggage must be itemized by the passenger, otherwise it is subject to be confiscated by the foreign revenue departments.

Section 17. Provides that in case anything happens to the boat, then the passenger shall be sent upon the next available boat.

Section 18. Provides that any complaint which the passenger may have [56] with respect for the failure of the company to perform the above conditions of this ticket must be presented by the passengers immediately after they arrive at the foreign port of destination to any agent of the Hamburg American Line, and that in the event an agreement cannot be reached thereby, the decision of the German Consul, acting at the port of disembarkation, should be final and his decision should be accepted by both parties without recourse to law.

Section 19. Provides that the passengers may retain the ticket.

Section 20. Provides that the passenger shall obey the captain at all times.

Section 21. Provides that the passengers should have enough money to protect themselves when they arrive in a foreign port.

Section 22. Provides that the company shall place its seal upon this ticket, and if it so places it thereon, the passenger agrees to sign it and abide by its terms.

Affiant deposes and says that there is no provision in the exhibits attached to the affidavit of J. HAMPTON HOGE, which purport to deal with personal injuries to passengers and further affirms that section number 18 thereof deals only with the provi-

sions contained in the exhibits called a contract by the libelees, and that any action for personal injuries would not be covered by section number 18.

Affiant deposes and states that the said exhibits do not bear the date of its supposed signing and do not bear as is provided in section 22 of the said exhibits, the seal of the Hamburg American Line.

GUSTAV SCHOENAMSGRUBER.

Subscribed and sworn to before me this 2nd day of October, 1933.

[Seal] THOMAS A. DOUGHERTY,
Notary Public in and for the City and County of San Francisco, State of California. [57]

[Title of Court and Cause.]

AFFIDAVIT OF EMMETT R. BURNS.

No. 21091-S
No. 21092-S

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO.—ss.

EMMETT R. BURNS, being first duly sworn, deposes and says:

That in the early part of this year, the exact month and date of which he cannot at this time state, he called at the office of the German Consul at Sansome and Pine Streets, San Francisco, California, in company with Gustav Schoenamsgruber, one of the libelants in the above entitled action, in order to secure from the said German Consul a

certified copy of the German Codes or the use of them, which was refused to the libelant and at which time the Vice-Consul to whom your affiant and the libelant above named were referred, Baron Van Berchen, [58] asked the father if he believed the child's story, intimating that he, Baron Van Berchen, did not believe it; that it is your affiant's belief that the said German Vice Consul is biased and prejudiced and that the consular office would be biased and prejudiced in favor of the Hamburg American Line and could not render a fair or impartial decision, opinion, or award, as they handle the business of clearing the ships of the Hamburg American Line and other matters involving the Hamburg American Line.

EMMETT R. BURNS.

Subscribed and sworn to before me this 2nd day of October, 1933.

[Seal] THOMAS A. DOUGHERTY,
Notary Public in and for the City and County of San Francisco, State of California. [59]

CONTRACT WITH PURCHASER.

THE PURCHASER OF THIS PREPAID PASSAGE FOR HIMSELF AND FOR THE PASSENGERS TO BE CARRIED HEREUNDER AGREES WITH THE CARRIER THAT THE SOLE AND EXCLUSIVE TERMS OF THE CONTRACT WHICH SUCH PURCHASE CREATES BETWEEN THE CARRIER AND THE PURCHASER AND/OR PASSENGERS ARE THE FOLLOWING:

(1) A contract of transportation will be issued by the Carrier to said passengers in a form in current use by the Carrier for the voyage and class in question at the date of issue.

(2) The mutual rights and obligations between the Carrier and the purchaser and/or passengers all shall be governed solely by the provisions of such contract of transportation.

(3) The responsibility of the Carrier is limited to that period only while the passengers and/or their baggage are on board the steamer and/or its tenders. Booking over the lines of other Carriers is solely for the convenience of the passengers, and no responsibility of any kind is assumed thereby by the Carrier, except to furnish the passenger with the tickets of such other Carriers or to refund so much of the passage money as represents the cost of such tickets.

(4) Except as in this contract provided and except in case of wrongful refusal of the Carrier to

perform said contract, neither the purchaser nor any passenger named herein shall have the right to demand cancellation thereof or the refund of any part of the ocean passage money received; but such cancellation may be granted by the Carrier, at the request of the purchaser or of the passenger first named herein, and thereupon the Carrier shall be relieved of all obligations thereunder and be liable only for the refund of the passage money and any monies received for other purposes, not paid over for such purposes, less commissions paid agent and a ten (10%) per centum cancellation fee. Both the purchaser and the passengers named herein hereby authorize the Carrier to pay the monies so refunded, at the option of the Carrier, either to the purchaser or to the passenger first named herein and, furthermore expressly waive any right of revocation of said authorization allowed under any provision of law of any state or country or otherwise. Any such person to whom paid, although not the one requesting cancellation, shall be conclusively deemed the agent to receive such monies on behalf of all persons interested therein and the Carrier by such payment shall be fully discharged of all liability for said monies.

(5) This contract is not available for persons who in the Carrier's judgment may be refused admission to the United States under the Immigration Laws of the United States at the time in force, or for any other reason, and/or who may be suffering from, or with, a contagious or infectious disease, and/or who, for any other cause, may endanger,

or be obnoxious to others. The Carrier reserves the right to refuse passage to such person or persons, and upon refunding the amount paid thereon (less European railroad fares or other expenses incurred on account of advances to passengers), the Carrier shall be discharged from all further liability either to the purchaser or passengers. Purchaser, purchase money, and passengers are all liable to reimburse the Carrier for expenses of bringing to port, maintaining at port, and returning to his (her) home, any passenger who, for any reason, is not permitted to, or does not sail.

(6) Unless extended by the Carrier at its option, this contract becomes void one year after date of issuance and is valid only for the persons named over-leaf and for the steamer for which accommodation (room or berth) has been reserved in advance. [60]

(7) All questions arising hereunder, or under the contract of transportation hereinabove referred to, shall be decided according to German law.

HAMBURG-AMERICAN LINE
United American Lines, Inc.
General Agents,

[Sgd] ANNA LANGE
Signature of Purchaser.

[Signed] A. G. B. KNUTH,
Signature of Agent.

Date 7/22-29 [61]

[Title of Court and Cause.]

OBJECTION TO MOTION TO ARBITRATE.

No. 21091-S

No. 21092-S

Libelants herewith file a formal objection to the making of a motion to arbitrate at this late date.

VINCENT W. HALLINAN,
S. T. HOGEVOLL.

[Endorsed]: Filed Oct. 2, 1933. Walter B. Maling, Clerk. [62]

(LIBELANT'S EXHIBIT No. 1.)

Purchaser's Receipt and Contract.
(To be retained by the Purchaser of the Ticket.)

HAMBURG-AMERICAN LINE.

Good for one year
from date of issue.

THIRD CLASS PREPAID No. 551,997
(Indicate class)

Received from the purchaser named at the foot hereof the amounts set forth below for transportation of the following passengers, but subject to all the terms and conditions of the contract on the reverse side of this receipt and of the westbound passage contract to be hereafter issued to said passengers; and also subject to the rules and conditions of all other carriers over whose lines said passengers may be forwarded.

Names of passengers (write plainly)					AGE
Mrs. Louise Schoenamsgruber					A
Hildegard "					C
Address Kramhagen Post Obernkirchen Grafschaff, Schaumburg					
From Hamburg To San Francisco destination in U. S. or Canada					
Class	Full	Half	Infant	Free Rate	$
European Rail Fare Ocean Fare or Through Rate	III	one	one	200.	200.
American Rail Fare					
U. S. Head Tax					8.
Landing money					
Other Charges					
Payments to Passengers					

Amount Paid $308.

[63]

Purchaser Must Read Carefully and Sign Contract on Reverse side.

Purchaser should forward "Passenger's Notice direct to the Passenger and advise him not to leave his home for the port of embarkation until advised to do so by the Company.

Name and Address of purchaser

Mrs. Anna Lange
1605 Polk St.
San Francisco, Calif.

Agent's name and Address

Hamburg American Line
Pacific Coast Passenger Office
574 Market Street
San Francisco, Calif.
A. G. B. Knuth

Date issued 7/22, 1929

CONTRACT WITH PURCHASER.

THE PURCHASER OF THIS PREPAID PASSAGE FOR HIMSELF AND FOR THE PASSENGERS TO BE CARRIED HEREUNDER AGREES WITH THE CARRIER THAT THE SOLE AND EXCLUSIVE TERMS OF THE CONTRACT WHICH SUCH PURCHASE CREATES BETWEEN THE CARRIER AND THE PURCHASER AND/OR PASSENGERS ARE THE FOLLOWING:

(1) A contract of transportation will be issued by the Carrier to said passengers in a form in current use by the Carrier for the voyage and class in question at the date of issue.

(2) The mutual rights and obligations between the Carrier and the purchaser and/or passengers shall be governed solely by the provisions of such contract of transportation.

(3) The responsibility of the Carrier is limited to that period only while the passengers and/or their baggage are on board the steamer and/or its tenders. [64]

Booking over the lines of other Carriers is solely for the convenience of the passengers, and no re-

sponsibility of any kind is assumed thereby by the Carrier, except to furnish the passenger with the tickets of such other Carriers or to refund so much of the passage money as represents the cost of such tickets.

(4) Except as in this contract otherwise provided and except in case of wrongful refusal of the Carrier to perform said contract, neither the purchaser nor any passenger named herein shall have the right to demand cancellation thereof or the refund of any part of the ocean passage money received; but such cancellation may be granted by the Carrier, at the request of the purchaser or of the passenger first named herein, and thereupon the Carrier shall be relieved of all obligations thereunder and be liable only for the refund of the passage money and any monies received for other purposes, not paid over for such purposes, less commissions paid agent and a ten (10%) per centum cancellation fee. Both the purchaser and the passengers named herein hereby authorize the Carrier to pay the monies so refunded, at the option of the Carrier, either to the purchaser or to the passenger first named herein and, furthermore expressly waive any right of revocation of said authorization allowed under any provision of law of any state or country or otherwise. Any such person to whom paid, although not the one requesting cancellation, shall be conclusively deemed the agent to receive such monies on behalf of all persons interested therein and the Carrier by such payment

shall be fully discharged of all liability for said monies. [65]

(5) This contract is not available for persons who in the Carrier's judgment may be refused admission to the United States under the Immigration Laws of the United States at the time in force, or for any other reason and/or who may be suffering from, or with, a contagious or infectious disease, and/or who, for any other cause, may endanger, or be obnoxious to others. The Carrier reserves the right to refuse passage to such person or persons, and upon refunding the amount paid thereon (less European railroad fares or other expenses incurred on account of advances to passengers), the Carrier shall be discharged from all further liability either to the purchaser or passengers. Purchaser, purchase money, and passengers are all liable to reimburse the Carrier for expenses of bringing to port, maintaining at port, and returning to his (her) home, any passenger who, for any reason, is not permitted to, or does not sail.

(6) Unless extended by the Carrier at its option, this contract becomes void one year after date of issuance and is valid only for the persons named over-leaf and for the steamer for which accommodation (room or berth) has been reserved in advance.

(7) All questions arising hereunder, or under the contract of transportation hereinabove referred to, shall be decided according to German law.

HAMBURGER-AMERICAN LINE

Anna Lange
Signature of Purchaser.

United American Lines, Inc.
General Agents
A. G. B. Knuth
Signature of Agent

Date 7/22/29

Filed Oct. 2, 1933. J. A. Schaertzer, Deputy Clerk. [66]

LIBELANT'S EXHIBIT 2.

December 27, 1932

J. Hampton Hoge, Esq.,
315 Montgomery Street
San Francisco, Calif.

Dear Sir:

Please be advised that at the time of trial we will move to remedy a typographical error in the case of Hildegard Schoenamsgruber by her guardian ad litem, Gustav Schoenamsgruber, vs. The Hamburg American Line, to strike out of paragraph IV, page 2, line 20 of said libel the words, "at Hamburg, Germany" so as to conform the libel in the action of Gustav Schoenamsgruber, vs. The Motor

Ship, "The Oakland", etc., with paragraph IV thereof, commencing with line 216.

Very truly yours,
VINCENT W. HALLINAN
By EMMETT R. BURNS.

ERB:BA

Filed October 2, 1933. Walter B. Maling, Clerk. [67]

AT A STATED TERM of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 11th day of October, in the year of our Lord one thousand nine hundred and thirty-three.

PRESENT: the Honorable, A. F. ST. SURE, Judge.

[Title of Court and Cause.]

Pursuant to a signed order this day filed, it is ordered that the motion of the Libelees to refer case for arbitration and staying proceedings be and the same is hereby granted. [68]

[Title of Court and Cause.]

ORDER DIRECTING PARTIES TO PROCEED TO ARBITRATION AND STAYING TRIAL HEREIN PENDING SUCH ARBITRATION.

No. 21091-S

In the above case the libelees duly filed notice of motion for an order submitting the entire controversy herein to the German Consul for arbitration and for an order staying trial of the action and further proceedings herein until such arbitration be had and for an order requiring such further proceedings as in the premises may be meet and proper.

Said motion came on regularly for hearing before the Court on October 2, 1933, J. Hampton Hoge, Esq., and Messrs. Derby, Sharp, Quinby & Tweedt appeared on behalf of the libelees and Vincent Hallinan, Emmett Burns and S. T. Hogevoll, Esqs., appeared on behalf of libelant.

Evidence was presented on behalf of both sides and the matter argued orally and in writing. The Court thereupon took the matter under submission and after due consideration makes its order herein as follows: [69]

Said motion made on behalf of the libelees should be and is hereby granted in the above case.

IT IS HEREBY ORDERED AND DECREED that the entire controversy set out in the libel herein be and the same is hereby submitted to ar-

bitration before E. Baron von Berchen, German Consul at San Francisco, as arbitrator, and the parties hereto are hereby directed to proceed to arbitrate said controversy before said arbitrator.

IT IS FURTHER ORDERED AND DECREED that until such arbitration has been had, the trial of the action herein and further proceedings herein are hereby stayed.

IT IS FURTHER ORDERED AND DECREED that this Court retain jurisdiction of the above entitled action to make such orders and enter such decrees as are required or contemplated by "The United States Arbitration Act" or otherwise permitted or required by law, and

IT IS FURTHER ORDERED AND DECREED that the arbitration before the German Consul shall be conducted as required by said Act and subject to such rules of law as may be applicable.

Dated, October 17, 1933.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Oct. 17, 1933. Walter B. Maling, Clerk. [70]

[Title of Court and Cause.]

EXCEPTION TO THE ORDER OF THE ABOVE ENTITLED COURT HERETOFORE MADE DIRECTING THE ABOVE NAMED PARTIES TO PROCEED TO ARBITRATION AND STAYING TRIAL PENDING SUCH ARBITRATION.

No. 21091-S
No. 21092-S

Libelants in the above entitled actions, which are consolidated, hereby expressly except to the order, and each and every part thereof, of the above entitled court directing the parties to proceed to arbitration and staying the trial of the above entitled cases pending such arbitration.

Dated, October 18, 1933.

VINCENT W. HALLINAN,
EMMETT BURNS,
S. T. HOGEVOLL,
Attorneys for Libelants. [71]

[Endorsed]: Served by me by leaving a true copy at office of Mr. Sharp with his secretary on 10/18/33.

EMMETT R. BURNS.

Filed Oct. 19, 1933. Walter B. Maling, Clerk. [72]

[Title of Court and Cause.]

NOTICE OF MOTION FOR AN ORDER VACATING THE ORDER OF THE COURT IN THE ABOVE ENTITLED ACTIONS DIRECTING THE PARTIES TO PROCEED TO ARBITRATION AND STAYING THE TRIAL HEREIN PENDING SUCH ARBITRATIONS.

No. 21091-S
No. 21092-S

To the Libelees above named and to J. Hampton Hoge, Esq., and Messrs. Derby, Sharp, Quinby & Tweedt, Esqs., their attorneys:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that on Monday, the 23rd day of October, the libelants in the above entitled action will move the above entitled Court, in its courtroom in the Post Office Building, at Seventh & Mission Streets, San Francisco, California, for an order vacating the order directing the parties to proceed to arbitration and staying trial herein pending such arbitration signed by the above entitled Court on [73] October 17, 1933, on the ground that the said order is null and void in law.

Dated, October 18, 1933.

VINCENT W. HALLINAN,
EMMETT BURNS,
S. T. HOGEVOLL,
Attorneys for Libelants.

[Endorsed]: Served by me by leaving a true copy at office of Mr. Sharp with his secretary on 10/18/33.

EMMETT BURNS.

Filed Oct. 19, 1933, Walter B. Maling, Clerk. [74]

[Title of Court and Cause.]

NOTICE OF MOTION FOR A REHEARING ON MOTION TO SUBMIT TO ARBITRATION.

No. 21091-S

To the Libelees above named and to J. Hampton Hoge, Esq., and Messrs. Derby, Sharp, Quinby & Tweedt, their attorneys:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that on Monday, the 23rd day of October, 1933, the libelant above named will move the above entitled Court in its courtroom in the Post Office Building, 7th and Mission Streets, San Francisco, California, at the hour of 10 o'clock A. M., for an order granting a rehearing on the motion to submit to arbitration.

SAID MOTION will be made upon the records and files in this action, upon the points and authorities heretofore submitted and hereafter to be submitted, and upon the affidavits heretofore filed.

Dated, October 17th, 1933.

VINCENT W. HALLINAN,
EMMETT BURNS,
S. T. HOGEVOLL,
Attorneys for Libelant. [75]

[Endorsed]: Receipt of a copy of the within notice re rehearing admitted this 17th day of October, 1933.

DERBY, SHARP, QUINBY & TWEEDT,
Attorneys for Libelees.

Filed Oct. 19, 1933. Walter B. Maling, Clerk.
[76]

[Title of Court and Cause.]

NOTICE OF MOTION FOR REVOCATION OF THE ARBITRATION CONTRACT.

No. 21091-S

To the libelees above named and to J. Hampton Hoge, Esq., and Messrs. Derby, Sharp, Quinby & Tweedt, their attorneys:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that on Monday, the 23rd day of October, 1933, the libelant above named will move the above entitled Court in its courtroom in the Post Office Building, 7th and Mission Streets, San Francisco, California, at the hour of 10 o'clock A. M., for its order revoking the arbitration contract in the above entitled action.

SAID MOTION will be made upon the records and files in this action, upon the points and authorities heretofore submitted, and hereafter to be submitted, and upon the affidavits heretofore filed.

Dated, October 17, 1933.

VINCENT W. HALLINAN,
EMMETT BURNS,
S. T. HOGEVOLL,
Attorneys for Libelant. [77]

[Endorsed]: Receipt of a copy of the within notice re revocation admitted this 17th day of October, 1933.

DERBY, SHARP, QUINBY & TWEEDT,
Attorneys for Libelees.

Filed Oct. 19, 1933. Walter B. Maling, Clerk. [78]

[Title of Court and Cause.]

PETITION FOR THE REVOCATION OF THE ARBITRATION CONTRACT UNDER TITLE 9, SECTION 2 OF THE U. S. CODE.

No. 21091-S

COMES NOW, the petitioner, HILDEGARD SCHOENAMSGRUBER, by her guardian ad litem, Gustav Schoenamsgruber, and respectfully represents:

Your petitioner respectfully prays for an order to the effect that the contract of arbitration may be revoked by reason of the fact that she was an infant of the age of five (5) years at the time the contract was made.

Respectfully submitted,
GUSTAV SCHOENAMSGRUBER,
Petitioner, by her guardian ad litem,
Gustav Schoenamsgruber.
V. W. HALLINAN,
E. BURNS,
S. T. HOGEVOLL,
Attorneys for Petitioner. [79]

[Endorsed]: Receipt of a copy of the within petition for revocation admitted this 17th day of October, 1933.

DERBY, SHARP, QUINBY & TWEEDT,
Attorneys for Libelees.

Filed Oct. 19, 1933. Walter B. Maling, Clerk.

[80]

[Title of Court and Cause.]

PETITION FOR A REHEARING ON MOTION TO SUBMIT TO ARBITRATION.

No. 21091-S

COMES NOW the petitioner, HILDEGARD SCHOENAMSGRUBER, by her guardian ad litem, Gustav Schoenamsgruber, and respectfully petitions the Honorable Court for a rehearing in the matter of submission to arbitration on the following grounds:

The Court did not fully look into the matter that this petitioner was a minor and could not submit to arbitration.

Respectfully submitted,
GUSTAV SCHOENAMSGRUBER,
Petitioner, by her guardian ad litem,
Gustav Schoenamsgruber.
VINCENT W. HALLINAN,
EMMETT BURNS,
S. T. HOGEVOLL,
Attorneys for Petitioner. [81]

[Endorsed]: Receipt of a copy of the within petition for rehearing admitted this 17th day of October, 1933.

DERBY, SHARP, QUINBY & TWEEDT,
Attorneys for Libelees.

Filed Oct. 19, 1933. Walter B. Maling, Clerk.
[82]

[Title of Court and Cause.]

AFFIDAVIT OF LOUISE SCHOENAMSGRUBER.

No. 21091-S
No. 21092-S

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO.—ss.

LOUISE SCHOENAMSGRUBER, being first duly sworn, deposes and says:

That she came to the United States on the Hamburg American Liner "The Oakland" on its maiden voyage; that the ship left Hamburg, Germany, on October 13, 1929; that her child, Hildegard Schoenamsgruber, one of the libelants herein, was about 5½ or 6 years of age; that at that time, the infant, Hildegard, could not read or write; that the child never saw any ticket or attended to any of the incidents of sailing; that your deponent does not recall having ever seen the so-called ticket which libelees claim she signed; that she never recalls having read, before the voyage or during the voy-

age or at the time of disembarkation in San Francisco, California, any such instrument which the [83] libelees claim to be the ticket contract; that your deponent never had any authority from her husband, Gustave Schoenamsgruber, who lived in San Francisco at the time your deponent left Hamburg, Germany, or at any other time, to sign any contract or alter the ticket made in San Francisco on July 22, 1929; that she did not act as the agent of Gustav Schoenamsgruber or the infant, Hildegard Schoenamsgruber; that she had no authority from Mr. Schoenamsgruber or Hildegard Schoenamsgruber, either orally or in writing; that the deponent did not make the contract of transportation, but that the deponent's husband, Gustav Schoenamsgruber, made the contract in San Francisco with the Hamburg American Line; that Anna Lang never acted as your deponent's agent, but as the agent of your deponent's husband, Mr. Schoenamsgruber; that your deponent has seen a photostatic copy of what the libelees claim to be a ticket agreement submitting to arbitration under disputes; that the said photostatic copy which she saw was blurred and indistinct; that to the best of her recollection, she never saw any such agreement and in the absence of seeing the original of this, she deposes and says, on this ground, that the signature on the photostatic copy, as far as she can make out, is not her signature.

LOUISE SCHOENAMSGRUBER.

Subscribed and sworn to before me this 25th day of October, 1933.

[Seal] THOMAS A. DOUGHERTY,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed October 25, 1933, Walter B. Maling, Clerk. [84]

[Title of Court and Cause.]

AFFIDAVIT OF GUSTAV SCHOENAMSGRUBER.

No. 21091-S
No. 21092-S

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO.—ss.

GUSTAV SCHOENAMSGRUBER, being first duly sworn, deposes and says:

That he is one of the libelants in the above entitled libels and the guardian ad litem of the libelant, Hildegard Schoenamsgruber; that he never authorized his wife, Louise Schoenamsgruber, either orally or in writing, to sign any ticket in Hamburg, Germany, and that he never authorized, either orally or in writing, his wife, Louise Schoenamsgruber, to sign any agreement of arbitration on behalf of the minor, Hildegard Schoenamsgruber.

GUSTAV SCHOENAMSGRUBER.

Subscribed and sworn to before me this 25th day of October, 1933.

[Seal] THOMAS A. DOUGHERTY,
Notary Public in and for the City and County of San Francisco, California. [85]

[Endorsed]: Filed October 25, 1933, Walter B. Maling, Clerk. [86]

[Title of Court and Cause.]

ORDER VACATING ORDER OF THE ABOVE ENTITLED COURT DATED OCTOBER 17, 1933, ORDERING THE ABOVE ENTITLED LIBEL AND CAUSE TO ARBITRATION.

No. 21091-S

The motion of the libelant in the above libel for an order to vacate the order of this Court dated October 17, 1933, entitled "Order Directing Parties to Proceed to Arbitration and Staying Trial Herein Pending Such Arbitration", and the motion of the libelants for a rehearing on the same order of October 17, 1933, and the petition of the above libelant for an order disaffirming the said arbitration agreement having come on regularly to be heard by the above entitled Court on Wednesday, the 25th day of October, 1933, and the libelant appearing in person and by her proctors, VINCENT W. HALLINAN, EMMETT R. BURNS and S. T. HOGEVOLL, and the libelees the Motorship "The Oakland", etc., and the Hamburg American Line, a corporation, appearing through their proctors, J.

HAMPTON HOGE, Esq., and MESSRS. DERBY, SHARP, QUINBY & TWEEDT, Esqs., and documentary evidence having been introduced, and oral and written arguments having been heard and introduced, and the Court having heard the same, and the motions and petitions having been submitted to the Court for its decision,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the order of the above entitled Court dated October 17, 1933, in the above entitled libel and cause entitled "Order Directing Parties to Proceed to Arbitration and [87] Staying Trial Herein Pending Such Arbitration" and each and every part and the whole thereof, is hereby vacated, set aside and rendered null and void and of no effect.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the motion of the libelees to submit the matter to arbitration is re-submitted and taken under consideration by the Court and it is therefore further ordered, adjudged and decreed that pending the decision of this Court on the motion of the libelees to arbitrate, the German Consul has no jurisdiction or right to proceed with this matter and is hereby stayed and restrained from issuing any orders or conducting any hearings of any nature or kind in these libels or causes.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the above entitled libel shall be continued to November 21, 1933, pending the decision of this Court on the motion of the libelees

to submit the cause to arbitration and all parties are hereby restrained until further order of this Court.

Done in open Court this 26th day of October, 1933.

[Seal] A. F. ST. SURE,
Judge of the Above Entitled Court.

[Endorsed]: Filed Oct. 27, 1933, 9:41 A. M., Walter B. Maling, Clerk. [88]

[Title of Court and Cause.]

ORDER VACATING MINUTE ORDER OF OCTOBER 11, 1933, ORDERING THE ABOVE ENTITLED LIBELS AND CAUSES TO ARBITRATION.

No. 21091-S
No. 21092-S

The motions of the libelants in the above entitled libels and causes to vacate and set aside the minute order of the Court ordering the above entitled libels to arbitration made by this Court on October 11, 1933, and the motions for a rehearing of the minute order made by this Court on October 11, 1933, ordering the above entitled libels and causes to be arbitrated, and the petition and the motion of the libelants for a disaffirmance of the contract of arbitration having come on regularly to be heard by this Court on the 25th day of October, 1933, libelants appearing through their proctors, VINCENT W. HALLINAN, EMMETT R. BURNS and S. T.

HOGEVOLL, and the libelees, The Motorship "The Oakland", her engines, boilers, etc., and the Hamburg American Line, a corporation, appearing through their proctors, J. HAMPTON HOGE, Esq., and Messrs. DERBY, [89] SHARP, QUINBY & TWEEDT, Esqs., and documentary evidence having been introduced, and oral and written arguments having been submitted, and the cause having been submitted to this Court for its decision,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the minute orders of October 11, 1933, in the above entitled libels, and each and both of them, are hereby set aside, vacated and rendered null and void and of no effect.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the motion of the libelees for submission to arbitration be re-submitted to this Court for its decision.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pending the re-submission of the motion of the libelees to arbitrate said libels, there shall be no action or proceeding of any nature or kind by or before the German Consul or any arbitrator, and you and each of you and the German Consul are hereby so restrained and it is hereby ordered that by virtue of this order, the German Consul has no jurisdiction in the matter whatever unless the Court so decrees by further order, upon notice to all parties.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the trial of the above entitled libels shall be suspended or continued to November 21, 1933, pending the re-submission of the libelees' motion to arbitrate.

Done in open court this 26th day of October, 1933.

[Seal] A. F. ST. SURE,
Judge of the Above Entitled Court.

[Endorsed]: Filed Oct. 27, 1933, 9:41 A. M. Walter B. Maling, Clerk. [90]

[Title of Court and Cause.]

ORDER DIRECTING PARTIES TO PROCEED TO ARBITRATION AND STAYING TRIAL HEREIN PENDING SUCH ARBITRATION.

(Made after re-hearing.)

No. 21091-S

In the above case, the libelees duly filed notice of motion for an order submitting the entire controversy herein to the German Consul for arbitration and for an order staying trial of the action and further proceedings herein until such arbitration be had and for an order requiring such further proceedings as in the premises may be meet and proper.

Said motion came on regularly for hearing before the Court on October 2, 1923, J. Hampton Hoge, Esq., and Messrs. Derby, Sharp, Quinby & Tweedt appeared on behalf of the libelees, and Vin-

cent Hallinan, Emmett Burns and S. T. Hogevoll, Esqs., appeared on behalf of libelant.

Evidence was presented on behalf of both sides and the matter argued orally and in writing. The Court thereupon took [91] the matter under submission and after due consideration made its order granting said motion, and ordering the entire controversy set out in the libel herein be referred to arbitration, directing the parties to proceed to arbitration, and staying further proceedings herein until after such arbitration be had.

Thereafter libelant moved to vacate said order and for a re-hearing on said motion and that the motion for reference to arbitration be re-submitted to the Court, and libelant also moved that the Court revoke the contract under which libelees had moved to arbitrate. Said motions came on regularly for hearing before the Court on the 25th day of October, 1933, both parties appearing by their proctors.

Upon the hearing of libelant's motions, libelant offered further affidavits, and libelees offered in further evidence (both upon libelant's motions and libelees' motion) the depositions taken herein and then on file herein, and the Court, after considering the matter, granted the motion to vacate its previous order and took under submission both libelees' motion to refer to arbitration and libelant's motion to revoke said contract, and upon such submission considered the testimony introduced by both parties, including the affidavits, pleadings and depositions on file.

And after considering the original and supplemental arguments of the parties, both written and oral, and the pleadings, affidavits and depositions on file, the Court makes its order herein as follows:

Libelant's motion to revoke said contract should be and is hereby denied, and

Libelees' motion that the controversy herein be referred [92] to arbitration in accordance with the contract of the parties should be and is hereby granted.

IT IS HEREBY ORDERED AND DECREED that the entire controversy set out in the libel herein be and the same is hereby submitted to arbitration before E. Baron von Berchen, German Consul at San Francisco, as arbitrator, and the parties hereto are hereby directed to proceed to arbitrate said controversy before said arbitrator. Said arbitrator may withdraw from the Court for his use in the arbitration proceedings before him, all pleadings, depositions and other papers on file herein, to be returned to this Court with his award herein, unless said pleadings, depositions or other papers are sooner ordered returned by this Court and said pleadings, depositions and other papers to be at all times subject to the further orders of the Court.

IT IS FURTHER ORDERED AND DECREED that until such arbitration has been had and the award of the arbitrator filed herein, the trial of the action herein and further proceedings herein are hereby stayed.

IT IS FURTHER ORDERED AND DECREED that this Court retain jurisdiction of the above entitled action to make such orders and enter such decrees as are required or contemplated by "The United States Arbitration Act" or otherwise permitted or required by law and

IT IS FURTHER ORDERED AND DECREED that the arbitration before said arbitrator shall be conducted as required by said act and subject to such rules of law as may be applicable.

Dated, December 5, 1933.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Dec. 5, 1933, Walter B. Maling, Clerk. [93]

[Title of Court and Cause.]

ORDER DIRECTING PARTIES TO PROCEED TO ARBITRATION AND STAYING TRIAL HEREIN PENDING SUCH ARBITRATION.

(Made after re-hearing.)

No. 21092-S

In the above case, the libelees duly filed notice of motion for an order submitting the entire controversy herein to the German Consul for arbitration and for an order staying trial of the action and further proceedings herein until such arbitration be had and for an order requiring such further proceedings as in the premises may be meet and proper.

Said motion came on regularly for hearing before the Court on October 2, 1933, J. Hampton Hoge, Esq., and Messrs. Derby, Sharp, Quinby & Tweedt appearing on behalf of the libelees and Vincent Hallinan, Emmett Burns and S. T. Hogevoll, Esqs., appeared on behalf of libelant.

Evidence was presented on behalf of both sides and the matter argued orally and in writing. The Court thereupon took the matter under submission and after due con- [94] sideration made its order granting said motion, and ordering the entire controversy set out in the libel herein be referred to arbitration, directing the parties to proceed to arbitration, and staying further proceedings herein until after such arbitration be had.

Thereafter libelant moved to vacate said order and for a re-hearing on said motion and that the motion for reference to arbitration be re-submitted to the Court, and libelant also moved that the Court revoke the contract under which libelees had moved to arbitrate. Said motions came on regularly for hearing before the Court on the 25th day of October, 1933, both parties appearing by their proctors.

Upon the hearing of libelant's motions, libelant offered further affidavits, and libelees offered in further evidence (both upon libelant's motions and libelees' motion) the depositions taken herein and then on file herein, and the Court, after considering the matter, granted the motion to vacate its previous order and took under submission both libelees' motion to refer to arbitration and libelant's motion to revoke said contract, and upon such sub-

mission considered the testimony introduced by both parties, including the affidavits, pleadings and depositions on file.

And after considering the original and supplemental arguments of the parties, both written and oral, and the pleadings, affidavits and depositions on file, the Court makes its order herein as follows:

Libelant's motion to revoke said contract should be and is hereby denied, and

Libelees' motion that the controversy herein be referred to arbitration in accordance with the contract of the parties should be and is hereby granted. [95]

IT IS HEREBY ORDERED AND DECREED that the entire controversy set out in the libel herein be and the same is hereby submitted to arbitration before E. Baron von Berchen, German Consul at San Francisco, as arbitrator, and the parties hereto are hereby directed to proceed to arbitrate said controversy before said arbitrator. Said arbitrator may withdraw from the Court for his use in the arbitration proceedings before him, all pleadings, depositions and other papers on file herein, to be returned to this Court with his award herein, unless said pleadings, depositions or other papers are sooner ordered returned by this Court and said pleadings, depositions and other papers to be at all times subject to the further orders of the Court.

IT IS FURTHER ORDERED AND DECREED that until such arbitration has been had and the award of the arbitrator filed herein, the

trial of the action herein and further proceedings herein are hereby stayed.

IT IS FURTHER ORDERED AND DECREED that this Court retain jurisdiction of the above entitled action to make such orders and enter such decrees as are required or contemplated by "The United States Arbitration Act" or otherwise permitted or required by law and

IT IS FURTHER ORDERED AND DECREED that the arbitration before said arbitrator shall be conducted as required by said Act and subject to such rules of law as may be applicable.

Dated, December 5, 1933.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Dec. 5, 1933, Walter B. Maling, Clerk. [96]

[Title of Court and Cause.]

LIBELANTS' EXCEPTIONS TO ORDER.

No. 21091-S
No. 21092-S

The libelants except to each and every portion of the order made by the Court on November 27, 1933, in submitting the above entitled actions to arbitration, and except to each and every portion of the proposed order submitted by the libelees on December 2, 1933.

VINCENT W. HALLINAN,
EMMETT R. BURNS,
S. T. HOGEVOLL,
Proctors for Libelants.

[Endorsed]: Filed Dec. 2, 1933, Walter B. Maling, Clerk. [97]

[Title of Court and Cause.]

DEMAND FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

No. 21091-S
No. 21092-S

The libelants in the above entitled actions hereby request and demand that the Court make findings of fact and conclusions of law on the motions of the libelees to submit the matter to arbitration before the German Consul.

VINCENT W. HALLINAN,
EMMETT R. BURNS,
S. T. HOGEVOLL,
Proctors for Libelants.

[Endorsed]: Filed Dec. 2, 1933, Walter B. Maling, Clerk. [98]

[Title of Court and Cause.]

DEMAND FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

No. 21091-S
No. 21092-S

The libelants in the above entitled actions hereby request and demand that the Court make findings of fact and conclusions of law on the motion of the

minor, Hildegard Schoenamsgruber, to disaffirm any alleged arbitration agreement.

VINCENT W. HALLINAN,
EMMETT R. BURNS,
S. T. HOGEVOLL,
Proctors for Libelants.

[Endorsed]: Filed Dec. 2, 1933, Walter B. Maling, Clerk. [99]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court room thereof, in the City and County of San Francisco, on Tuesday, the 5th day of December, in the year of our Lord one thousand nine hundred and thirty-three.

Present: The Honorable A. F. ST. SURE, Judge.

[Title of Court and Cause.]

No. 21091-S
No. 21092-S

It is, by the Court, ordered that the libelants' exceptions to the order made on November 27, 1933, and the exceptions to the proposed order submitted by libelees on December 2, 1933, be and the same are hereby overruled and that the libelants be allowed an exception to the ruling of the Court; and that the demands of the libelants for findings of fact and conclusions of law be and the same are hereby denied, and that the libelants be allowed an exception to the ruling of the Court. [100]

GENERAL OBJECTIONS AND EXCEPTIONS OF THE LIBELANTS TO THE INTERROGATORIES OF THE LIBELEES TO BE PROPOUNDED TO ALL WITNESSES.

Libelants object and except to the taking of the testimony of each and every witness, to-wit: Arnold Rossler, Frieda Margr. Rossler, Dr. Hans Ritter, Gustav Kerries, Dr. Alfred Otto Stammann, Dr. G. F. Baur and Hermann Sutor, on the following grounds:

1. Libelants object and except to the taking of the testimony of each and every one of the above mentioned witnesses on the ground that this court, at the time the case was set on October 3rd, 1932, gave a late date, to-wit: January 17, 1933, on the condition that the Libelees would have their interrogatories settled and taken prior to the date of trial, January 17, 1933; that the taking of these interrogatories in Germany has purposely been delayed and that they cannot be settled, sent to Germany, taken and returned prior to the date of trial, and will not give the Libelants time in which to check the truthfulness of the answers from Germany, which they otherwise would have had, had the interrogatories been filed earlier than the last week in December, 1932.

2. That unless taken before the American Consul or whomever he may designate in his stead, and not until full identification is made as to the fact of whether each and every witness who appears is in truth the person designated, Libelants object and

except to the taking of the testimony of each and every one of the above mentioned witnesses.

3. Libelants object and except to the taking of the testimony of each and every one of the above mentioned witnesses unless all of the witnesses attend at the place designated by counsel so as to have them each identify the other, particularly doctor and patient, to ascertain whether the doctor has in mind the particular man guilty of the offense which has been charged in the libel.

4. Libelants object and except to the taking of the testimony of each and every one of the above-mentioned witnesses unless each and every witness is placed under oath and the nature of the proceeding and the dignity thereof impressed upon them.

[Endorsed]: Filed Oct. 24, 1932. Walter B. Maling, Clerk. [101]

OBJECTIONS AND EXCEPTIONS TO THE INTERROGATORIES OF THE LIBELEES TO BE PROPOUNDED TO THE WITNESS.

GUSTAV KORRIES.

Libelants object and except to all the interrogatories to be propounded to the witness, Gustav Korries, on the following grounds:

Libelants object and except to each and every interrogatory on the ground that they are not timely and will delay the date of the trial and on

the ground that the attorneys for the Libelees have purposely delayed the taking of these interrogatories after the Court instructed them that the case was set for January 17, 1933, allowing them a long period of time to prepare the same; that these interrogatories are propounded at the last minute and will not be answered and returned from Germany until a long time after January 17, 1933.

Libelants object and except to Interrogatory No. 14 on the ground that it calls for the opinion and conclusion of the witness.

Libelants object and except to Interrogatory No. 15 on the ground that the question may produce an answer in violation of the parol evidence rule.

Libelants object and except to Interrogatory No. 19 on the ground that the delivery of the contract is immaterial, the question is, where was it made?

Libelants object and except to Interrogatory No. 20 and 21 on the ground that the best evidence is, under which flag the said Motorship "Oakland" flew on the voyage of October 30, 1929, and under what laws of which nation the said motorship was registered, is the list of registration of the said ship at said time.

Libelants object and except to Interrogatory No. 22 on the ground that the witness is incompetent to testify as the previous questions 1 to 7 show that he is but a mere ticket agent and it is not shown that he is an officer of the corporation and there is no foundation for the question to show whether this man was in a position to know, and further,

to know whether or not there was any [102] person in San Francisco authorized to issue tickets.

Libelants object and except to Interrogatory No. 23 on the same ground as Interrogatory No. 22.

Libelants object to each and every question, each and every one separately and apart from the other, from 1 to 24 inclusive, on the ground that the libelant, Hildegard Schoenamsgruber, was a minor of the age of six (6) years and that no contract is binding on a minor.

[Endorsed]: Filed Oct. 24, 1932. Walter B. Maling, Clerk. [103]

AT A STATED TERM of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday the 9th day of January, in the year of our Lord one thousand nine hundred and thirty-three.

PRESENT: The Honorable, A. F. ST. SURE, Judge.

[Title of Court and Cause.]

No. 21091-S

After hearing had, it is ordered that * * * the objections and exceptions to interrogatories to be propounded to Gustav Korries and numbered 14, 15, 19, 20, 21, 22, 23 and 24 be and the same are hereby overruled; * * * that the objections to the

additional cross-interrogateries to be propounded to Gustav Korries and numbered 15, 16, 17, 19, 20, 21, 22, 23, 25, 26, 27, 28 be sustained * * *

Further ordered that the Libelants and Libelees be and they are each allowed an exception to the ruling of the Court. * * * [104]

CERTIFIED TRANSLATION.
Certified Copy.
LOWER COURT IN HAMBURG.
Abteilung fur Rechtshilfe in Zivilsached
having jurisdiction of civil cases.

Ref. No.:
H. H. A. No. 1083/1933. Hamburg, May 27, 1933
Journal D. No. 486

In the matter of	Hildegard SCHOENAMS-GRUBER by her guardian Gustav Schoenamsgruber and Gustav SCHOENAMS-GRUBER, Libelants,
Present:	
Judge Dr. Hegener as Judge.	
Timmermann, Clerk, as Record Officer of the Court's Office	vs. the Motorship "The OAKLAND" her boilers, engines, etc., and the Hamburg-AMERICAN LINE, a corporation, Libelees,

there appeared when the matter was called at the term fixed for taking the evidence:

1. for the parties:
   nobody for Libelants,
   for Libelees: Solicitor Dr. Schon,
2. the witness Gustav Korries,
   who adduced Exhibits A, B, and photo of Exhibit B.

The witness Gustav Korries was then heard alone as follows: [105]

INTERROGATORIES OF LIBELEES PROPOUNDED TO GUSTAV KORRIES AND HIS ANSWERS.

Interrogatory No. 1: State your full name and address?

Answer: Gustav Korries, 101, III. Fuhlsbuttelerstrasse, Hamburg.

Interrogatory No. 2: What is your age?

Answer: 57 years.

Interrogatory No. 3: What is your occupation?

Answer: I am an officer dealing with passengers of the line.

Interrogatory No. 4: What was your occupation on the 12th day of October, 1929?

Answer: Attending to passengers.

Interrogatory No. 5: Were you on said 12th. day of October, 1929, employed as ticket agent in the city of Hamburg for the Hamburg-American Line?

Answer: Yes, on October 12th., 1929, I was an employee of the Hamburg-American Line. My occupation was as follows: registering passengers in the Overseas Home, ascertaining particulars of the

passengers and such facts as are necessary for the embarkation of the passengers. Generally I see the passengers personally who stay over night in the Overseas Home.

Interrogatory No. 6: As ticket agent of the Hamburg Office of [106] the Hamburg-American Line, what, if any, are your duties in connection with issuing tickets for passage on your steamers from the City of Hamburg, Germany, to the City of San Francisco, United States of America?

Answer: The tickets are issued in the head office at 56, Hermannstrasse, Hamburg, and are then sent on to the Overseas Home. Only occasionally I hand passengers their tickets personally. For other details I refer to my answer to question No. 5.

Interrogatory No. 7: On the said day of 12th. October, 1929, what if any, were your duties in connection with the issuance of tickets for transportation of passengers from the City of Hamburg, Republic of Germany, to the Port of San Francisco, United States of America?

Answer: On October 9th., 1929, I have among other passengers, registered Mrs. Schoenamsgruber and daughter as per Exhibit A.

In this connection my duties consisted of: comparing the personal questionair or filling same in, if not filled in already, examining passports and visa.

Ascertaining where and whether payment was made. Determining what cash passengers carried.

Interrogatory No. 8: State whether or not on the 12th. day of October, 1929, you issued to one

Lieschen Schoenamsgruber and one Hildegard Schoenamsgruber a ticket entitling the said persons from the Port of Hamburg, Germany, [107] to the Port of San Francisco, United States of America, on the motorship "Oakland" on a voyage commencing October 30th, 1929?

Answer: From the registration which I personally marked with "K" it is evident that Mrs. Lieschen Schoenamsgruber with daughter Hildegard arrived in Hamburg at the Overseas Home on the 9th. day of October, 1929, and stayed there for the fulfillment of the formalities until the ship sailed.

As far as I know Mrs. Schoenamsgruber signed the ticket while she was in the Overseas Home and it was then handed to her, cf. Exhibit B. As is evident from the records of the Company this was a passage that was paid for in San Francisco. Cf. answer No. 19.

The voyage commenced on October 12th., 1929.

Interrogatory No. 9. If the foregoing interrogatory is answered in the affirmative, state the circumstances under which said ticket was issued.

Answer: In such instances the advice of the payment of the passage money is passed from San Francisco via New York and Hamburg to the local agent (in this case Buckeburg in Germany) and the passengers agreeing the contract for transportation is closed in Hamburg.

Interrogatory No. 10: What monetary consideration was there for the issuance of the ticket?

Answer: According to the books of the Hamburg-American Line 300 Dollars have been paid for Lieschen and Hildegard Schoenamsgruber plus [108] 8 Dollars head tax.

Interrogatory No. 11: State the circumstances under which the monetary consideration for the issuance of the said ticket was paid.

Answer: Replied to in the foregoing answer. The ticket is introduced in the original and a copy, Exhibit B of Libelees.

Payment was made in San Francisco. I can therefore say nothing regarding additional circumstances.

Interrogatory No. 12: Do you, at this time, have said ticket in your possession?

Answer: Yes, I am to adduce the same.

Interrogatory No. 13: If the foregoing interrogatory is answered in the affirmative, please produce the same.

The libelees offer said ticket for identification and ask that the Commissioner mark said ticket "Libelees' Exhibit A" for identification and that the same be attached to and made part of this deposition.

Answer: (Done as above.)

Interrogatory No. 14: Does this ticket which has been marked "Libelees' Exhibit A" for identification contain the entire agreement which was made between the Hamburg-American Line and the said Lieschen Schoenamsgruber and Hildegard Schoenamsgruber?

Answer: I have marked the passenger file as "Exhibit A" and the ticket as "Exhibit B". The ticket "Exhibit B" as far as I know contains the entire agreement made with Lieschen and Hildegard Schoenamsgruber. [109]

Interrogatory No. 15: Was there any other agreement or memorandum either oral or in writing made in connection with said contract of passage which is not contained in the said ticket?

Answer: No. (at least not as far as I know).

Interrogatory No. 16: If the foregoing interrogatory is answered in the affirmative, please produce the same.

If any such memorandum is produced the libelees offer said memorandum as an exhibit for identification and request that the said Commissioner mark said memorandum as "Libelees' Exhibit B" for identification and that the same be attached to this deposition and be a part thereof.

Answered unde No. 15.

Interrogatory No. 17: Was said ticket issued at the Port of Hamburg, Republic of Germany, or was it issued at the Port of San Francisco, United States of America?

Answer: The ticket was issued in the Port of Hamburg, Germany.

Interrogatory No. 18: If the ticket was issued at the Port of Hamburg, Republic of Germany, state at what office it was issued.

Answer: In the head office of the Hamburg American Line at Hamburg, 56, Ferdinandstrasse.

Interrogatory No. 19: At what place was the said ticket delivered to the said Lieschen Schoenamsgruber and Hildegard Schoensamsgruber?

Answer: As far as I am aware the ticket was handed to Mrs. Schoenamsgruber and daughter at the Overseas Home of the Hamburg-American Line. Hargurger Chaussee 1,.

In some very few instances, for instance [110] in cases where passengers arrive rather late, or payment of the passage money is rather delayed, it can also happen that because of want of time the ticket is handed out on board boat.

Interrogatory No. 20: What, if any, flag of what nation did said motorship "Oakland" fly on said voyage of October 30, 1929?

Answer: The motorship "Oakland" on its voyage commencing in Hamburg on the 12th. day of October, 1929, (not as stated in the interrogatory on October 30) was flying the German Flag.

Interrogatory No. 21: Under the laws of what nation was said motorship "Oakland" registered?

Answer: I ascertained from my fellow-clerks the German law regarding the law regarding the flags of ships of the commercial fleet, dated June 22nd., 1899, comes into question here, and which also regulates the registration of ocean going ships.

Interrogatory No. 22: Was there any individual, co-partnership or corporation at the Port of San Francisco, United States of America, authorized to issue tickets for passenger transportation from the Port of Hamburg, Republic of Germany,

to the Port of San Francisco, United States of America, on said 12th. day of October 1929, or at any time prior thereto?

Answer: I do not know this.

Interrogatory No. 23: On said 12th. day of October, 1929, or at any time prior thereto, was there any individual, co-partnership or corporation, at the Port of San Francisco, United States [111] of America, authorized to make contracts of passenger transportations from the Port of Hamburg, Republic of Germany, to the Port of San Francisco, United States of America?

Answer: Of that I have no personal knowledge. The ticket Schoenamsgruber was issued in Hamburg.

Interrogatory No. 24: Did said individual, co-partnership or corporation, which received said consideration for said ticket from said Gustav Schoenamsgruber at the Port of San Francisco, United States of America, have any authority from the Hamburg-American Line in connection with the issuance of said ticket other than to forward said money to the city of Hamburg, Germany, with the request that a ticket be issued in said city of Hamburg, Republic of Germany, for the transportation of said Lieschen Schoenamsgruber and Hildegard Schoenamsgruber from the Port of Hamburg, Republic of Germany, to the Port of San Francisco, United States of America?

Answer: I take it that there was a person authorized in San Francisco to receive the money.

Mrs. Schoenamsgruber submitted to me under No. 551997 a slip entitling her to the pasage (Friescheln). The latter was issued in San Francisco.

Signed: Gustav Korries. [112]

CROSS-INTERROGATORIES OF LIBELANTS PROPOUNDED TO GUSTAV KORRIES AND HIS ANSWERS.

Cross-Interrogatory No. 1: You are now in the employ of the Hamburg-American Line, are you not?

Answer: Yes.

Cross-Interrogatory No. 2: Did you make any contract with Mr. or Mrs. Schoenamsgruber yourself, personally?

Answer: I answered to this under No. 8 of the Libelees' interrogatories.

Cross-Interrogatory No. 3: Did you receive the money yourself from either Mr. or Mrs. Schoenamsgruber direct?

Answer: The passage was paid for in San Francisco as I stated under Interrogatory of Libelees' No. 8.

Cross-Interrogatory No. 4: Were you paid the money before you handed the ticket to the Schoenamsgrubers or after you handed the ticket to them?

Answer: cf. No. 3.

Cross-Interrogatory No. 5: Did you explain to the Schoenamsgrubers what the ticket contained before you handed it to Mr. or Mrs. Schoenamsgruber?

Answer: As outlined before I have attended to Mrs. Lieschen and Hildegard Schoenamsgruber. As far as I am aware they received the ticket while they were in [113] the Overseas Home from 9th. to 12th. October, 1929. Mr. Schoenamsgruber went over before that time. I take it that he was attended to in the same manner as Mrs. Schoenamsgruber. Cf. my answers to questions No. 8 and 19 of Libelees.

As far as I know I have not handed out the ticket personally.

Cross-Interrogatory No. 6: Was the said ticket written or printed in German or English?

Answer: The general conditions mentioned on the ticket are printed in the German Language. Particulars, such as name, number of the cabin, name of the ship, Port of Destination, Date, reference to payment No. 551997 and signature are added by hand. In addition I refer to the ticket itself.

Cross-Interrogatory No. 7: You are accustomed to the details with which an immigrant is required to conform prior to being granted a visa and prior to their leaving Germany, are you not?

Answer: In general, yes.

Cross-Interrogatory No. 8: In your position you have knowledge of the fact that where a citizen of Germany is granted a visa to enter the United States as his place of permanent residence that they must pass a medical examination by the American Consulate, have you not?

Answer: Yes.

Cross-Interrogatory No. 9: The Schoenamsgrubers had such an examination, did they not?

[114]

Answer: As the Schoenamsgrubers had a visa for the United States when they arrived in Hamburg I must take it that they had been examined by the surgeon of the American Consulate prior to being granted the visa.

In addition I should like to state that the visa for the Schoenamsgrubers was not granted by the Consulate in Hamburg, but, as is evident from the record files, in Cologne on August 8th., 1929, under quota number 10245/46.

Cross-Interrogatory No. 10: They had examinations both by the American Consulate or the surgeon connected with the United States Public Health Department and attached with the American Consulate and by your own company doctors prior to their leaving Germany, did they not?

Answer: As regards the surgeon of the Consulate I refer to the foregoing answers.

As far as I know, however, the medical examinations of the female passengers, as a rule, are not for venereal diseases. Female passengers are only examined for such diseases, and then by a specialist, when they are outwardly suspicious. The surgeon of the company has also examined the family Schoenamsgruber.

Cross-Interrogatory No. 11: It is a fact, which you know of your own knowledge acquired in the course of your business with the steamship company, that the American Consul will not issue a

visa to anyone suffering from any sort of a disease or ailment [115] of any nature or kind, is not that so?

Answer: Yes.

Cross-Interrogatory No. 12: The Schoenamsgrubers were found to be free, by your company doctors, from any ailment of any nature or kind, is that not a fact?

Answer: The surgeon of the company stated to me that the Schoenamsgrubers were free from all ailments that prohibit an immigration into the United States of America.

Cross-Interrogatory No. 13: You know of your own knowledge, do you not, that the United States Public Health Department reported the Schoenamsgrubers free from all ailments and venereal diseases, do you not?

Answer: The result of the examination by the surgeon of the Consulate is not communicated to the company. Neither was such report made in the case of the Schoenamsgrubers.

Cross-Interrogatory No. 14: Please produce the record of your company as to the value of the freight and cargo on the motorship "Oakland" on its voyage of October 30th., 1929, to San Francisco, giving the value of the cargo at the time it left Hamburg and the fluctuation and increase as it arrived at each port, including its estimated value at the time it arrived in the Customs House in San Francisco.

Answer: I cannot submit such records. I am exclusively employed in the passenger department.

If such records exist they are in the freight department.

I repeat that the voyage commenced on October 12th., 1929. [116]

Cross-Interrogatory No. 15: The motorship "The (additional) Oakland" was owned and operated on October 12th., 1929, to November 12th., 1929, by the Hamburg American Line, was it not?

Answer: Yes.

Read out, approved.

Signed: GUSTAV KORRIES.

The witness Gustav Korries was duty sworn in the prescribed manner.

The duplicate of the certified translation of the interrogatories and cross-interrogatories that were to be propounded to the witness Gustav Korries together with the answers and the signatures of the witness were attached to this protocol.

Signed: DR. HEGENER.

Signed: TIMMERMANN.

Certified:

Signed: KUHL,
Secretary of the Law Courts,
as Record Officer of the
Lower Court's Office.

L. S.

Lower Court in Hamburg. [117]

CERTIFICATE.

In pursuance of the commission attached hereto and on the 27th. day of May, 1933, at Hamburg, Germany, there appeared before me, Judge Dr. Otto Hegener, at Hamburg, Germany, in person GUSTAV KORRIES, one of the witnesses named in said commission who anwered the direct and cross-interrogatories attached to the said commission and was then duly sworn by me.

The answer of witness to each interrogatory was put down in writing by him and by myself under my guidance in the space reserved for this purpose after each interrogatory; the deposition thust transcribed was read out to the said witness and, after witness corrected same in all details as desired by him, said witness affixed his signature in my presence.

IN WITNESS WHEREOF I have certified this today by my hand and seal of the Court.

Hamburg, May 27th, 1933.

Signed: DR. HEGENER.

L. S.
Lower Court in Hamburg. [118]

[Title of Court and Cause.]

DEPOSITION OF CARL FRIEDERICH VICTOR NEUMANN.

No. 21091-S No. 21092-S

[119]

CERTIFICATE.

In pursuance of the commission attached hereto and on July 5th, 1933, at Hamburg, Germany, there appeared before me, Walter Posner, Judge of the Lower Court in Hamburg, Germany, in person:

VICTOR NEUMANN,

one of the witnesses named in the commission, who, after having his attention drawn by me to the sanctity of an oath, answered to the direct interrogatories attached to the said commission and was then sworn by me as witness and expert in the prescribed manner.

The answer of said witness to each interrogatory was put down in writing by witness; this written deposition was read out to witness and after witness corrected same in all details as desired by him said witness signed the same in my presence.

IN WITNESS WHEREOF I have certified this by my hand and seal of the Court.

Hamburg, July 5th, 1933.

(L. S.) Signed: POSNER.

(L. S.)
Lower Court in Hamburg.

Certified:

KUHL,
Secretary to the Court as Record Officer of the Court's Office.

[120]

In the matter of

HILDEGARD SCHOENAMSGRUBER, ETC.,

vs.

THE MOTORSHIP "OAKLAND", ETC.,

and

THE HAMBURG LINE.

I answer the interrogatories propounded to me as follows:

1. State your name in full.

Carl Friedrich Victor Neumann.

2. Where do you reside?

76, II. Sierichstrasse, Hamburg.

3. What is your age?

55 years.

4. What is your occupation?

Employee of the Hamburg American Line in Hamburg as Director of the Passenger-Department.

5. What was your occupation at all times from the 22nd day of July, 1929, to and including the 30th day of October, 1929?

As under 4.

6. For how long a period of time had you been engaged in the foregoing occupation?

Since 1900 exclusively in the passenger traffic. As Director of the Passenger-Department since 1925.

7. If according to the two foregoing interrogatories you should testify that for the past eight years you have been head of the passenger department of the Hamburg-American Line, state whether or not you are custodian of all the books and records

of the Company having to do with or pertaining in any respect to the booking and transportation of emigrants on the Hamburg-American Line to the United [121] States of America between the dates of July 22nd, 1929, to and including the 30th day of October, 1929.

Although I am not custodian of all books and records, etc., of the Company that have in any respect to do with the booking and transportation of emigrants (passengers) on the Hamburg-American Line to the United States of America between the dates of July 22nd, 1929, to and including the 30th day of October, 1929, or in any way pertain to this the books and lists are in safe keeping under my supervision and are at any time at my disposal for inspection by me.

8. If the foregoing interrogatory should be answered in the affirmative, state whether or not such records are made directly under your supervision.

Records or entries in the books and lists are made by the employees of the passenger department according to rules laid down by the management of the passenger department, i. e., by me. A direct supervision on my part is rendered impossible by the size of the business.

9. Did you carefully examine the books and files of the Hamburg-American Line in arranging for the transportation of Mrs. Louise Schoenamsgruber and Hildegard Schoenamsgruber from Hamburg, Germany, to San Francisco, California, U. S. A., via the M. S. "Oakland" on a date between the

22nd day of July, 1929, and the 30th day of October, 1929?

The volume of the business in general does not permit of a personal examination of the books and files upon arrangement of passages.

10. Will you state all the facts covering the entire transaction involving the booking, payment and arranging for the transportation for the said Mrs. Louise Schoenamsgruber [122] and Hildegard Schoenamsgruber from the City of Hamburg, Germany, to San Francisco, California, U. S. A., on a date between the 22nd day of July, 1929, and the 30th day of October, 1929? In order to refresh your recollection you may refer to any of the books and files of the Hamburg-American Line or other records which were made under your supervision.

On July 22nd, 1929, at the Hamburg American Line, Pacific Coast Passenger Office, 574 Market Street, San Francisco, Cal., a passage was paid for by Mrs. Anna Lange, 1605 Polk Street, San Francisco, Cal., for Mrs. Louise Schoenamsgruber and daughter Hildegard, Krainhagen, Post Obernkirchen, County Schaumburg, covering a third class passage from Hamburg to San Francisco and amounting to $308.00 including American head tax. Advice of this was sent to us under No. 551997 by our house in New York, Hamburg American Line, 39, Broadway, New York, N. Y., together with the advice list of prepaids No. 899/2 of July 30th, 1929, and was received by us under date of August 9th, 1929. On August 10th, 1929, we advised our agent in Buckeburg, Mr. Karl Harting, that a passage for

Mrs. Louise Schoenamsgruber and daughter, Krainhagen, for a passage, 3rd class, from Hamburg to San Francisco had been paid with $308.00 and that he should get in touch with them regarding the booking. With letter of August 13th, 1929, our Agent in Buckeburg sent us an order for booking a passage per Motorship "Oakland", leaving Hamburg on October 12th, 1929, which order was signed by Mrs. Schoenamsgruber. On the basis of this we reserved on the Motorship "Oakland", 12th October, 1929, the beds 1 and 2 in the four-berth cabin 46 and under date of August 15th, 1929, sent a letter to the agent advising him that the [123] above berths had been reserved for the passengers and that the latter would have to report themselves on October 10th, 1929, for final details at our office in Hamburg, 58, Ferdinandstrasse, or in the Overseas Home of the Hapag, Hamburg-Veddel. According to passenger file No. 13797 of our Overseas Home Hapag Mrs. L. Schoenamsgruber and daughter arrived there on October 9th, 1929, in the afternoon, and stayed there until the embarkation on October 12th, 1929. After examining the documents for the voyage and upon return of the letter containing the order that had been issued by us Mrs. Schoenamsgruber, before the embarkation, was given the contract of carriage third class No. 468 for herself and her six-year-old daughter Hildegard for the voyage in the Motorship "Oakland", October 12th, 1929, from Hamburg to San Francisco, for signature, and after she had added her signature same was handed to her. On October 12th, 1929, at about 2:30 p. m.,

the pasengers were taken by motorbus to the Motorship "Oakland", lying in the Kuhwarder Hafen, at shed 71b.

11. As the head of the Passenger Department of the Hamburg-American Line for the past eight years, are you conversant with the emigration laws of Germany in force from the 22nd day of July, 1929, to the 30th day of October, 1929, regulating, if at all, the place where contracts for the transportation of emigrants from Germany to the United States of America must be made?

12. If the foregoing interrogatory is answered in the affirmative, state what the law of Germany is pertaining to said subject.

11 and 12. The emigration law of June 9th, 1897, I am quite familiar with the law itself, par. 22, contains no special provisions as to the place where a contract with a passenger must be made, on the other hand it is evident from [124] the present circumstances that the contract Schoenamsgruber could only be closed in Germany. The law provides that a written contract must be made and this is only complied with when a contract has been closed with the passenger himself not with the person who pays for the passage in advance or any other third parties.

Hamburg, July 5th, 1933.

Sgd. VICTOR NEUMANN.

EXHIBIT 3.

To the Protocol of the Lower Court in Hamburg, Department for legal assistance in civil cases,
of July 5th, 1933,
to J. A. No. 2232 of 1933

Sgd. Posner
as Judge.

Sgd. Kuhl
Secretary to the Court.

[Endorsed]: Filed Oct. 3, 1933. Walter B. Maling, Clerk. [125]

[Title of Court and Cause.]

NOTICE OF APPEAL.

No. 21091-S

To: The Motorship "The Oakland", her boilers, engines, etc. and the Hamburg American Line, a corporation, Libelees; and to J. Hampton Hoge, Esq., and Messrs. Derby, Sharp, Quinby & Tweedt, Esqs., proctors for Libelees; and to the Clerk of the United States District Court for the Northern District of California, Southern Division:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE and you are hereby notified that the above named Libelant, Hildegard Schoenamsgruber, by Gustav Schoenamsgruber, her guardian ad litem, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that certain decree of the above entitled Court entered herein the 5th day of December, 1933, which said decree is entitled "Order Directing Parties to

Proceed to Arbitration and Staying Trial Herein Pending Such Arbitration (made after rehearing)", and from the whole of said decree.

Dated, San Francisco, California, this 14th day of December, 1933.

VINCENT W. HALLINAN,
EMMETT R. BURNS,
S. T. HOGEVOLL,
Proctors for Libelant and Appellant. [126]

[Endorsed]: Filed Dec. 15, 1933. Walter B. Maling, Clerk. [127]

[Title of Court and Cause.]

NOTICE OF APPEAL.

No. 21092-S

To: The Motorship "The Oakland", her boilers, engines, etc. and the Hamburg American Line, a corporation, Libelees; and to J. Hampton Hoge, Esq., and Messrs. Derby, Sharp, Quinby & Tweedt, Esqs., proctors for Libelees; and to the Clerk of the United States District Court for the Northern District of California, Southern Division:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE and you are hereby notified that the above named Libelant, Gustav Schoenamsgruber, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that certain decree of the above entitled Court entered herein the 5th day of December, 1933, which said decree is

entitled "Order Directing Parties to Proceed to Arbitration and Staying Trial Herein Pending Such Arbitration (made after rehearing)", and from the whole of said decree.

Dated, San Francisco, California, this 14th day of December, 1933.

VINCENT W. HALLINAN,
EMMETT R. BURNS,
S. T. HOGEVOLL,
Proctors for Libelant and Appellant. [128]

[Endorsed]: Admission of service refused—served by leaving copy at office of Derby, Quinby, Sharp & Tweedt by me on 12/15/33.

EMMETT R. BURNS.

Filed Dec. 15, 1933. Walter B. Maling, Clerk. [129]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

No. 21091-S

NOW COMES the Libelant and Appellant, HILDEGARD SCHOENAMSGRUBER, by Gustav Schoenamsgruber, her guardian ad litem, and says that in the record and proceedings, as also in that certain decree of the Southern Division of the United States District Court for the Northern District of California, given, made and entered therein on the 5th day of December, 1933, which said decree is entitled "Order Directing Parties to Proceed to Arbitration and Staying Trial Herein Pend-

ing Such Arbitration" (made after rehearing) manifest error hath happened to the grievous damage of the said HILDEGARD SCHOENAMS-GRUBER, the Libelant and Appellant herein; and said Libelant and Appellant doth now make, assign and present the following assignment of the errors upon which she will rely in the prosecution of her appeal from said decree and order to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

1. The said District Court of the United States erred in said Decree and Order in granting the motion of the Libelees for an order submitting the entire controversy herein to the German Consul for arbitration and for an order staying trial of the action and further proceedings herein until such arbitration [130] be had and for an order requiring such further proceedings in the premises as may be meet and proper.

2. The said District Court erred in the giving, making, rendering and entering of the said decree, which said decree was, and is, in the words and figures following, to-wit:

"In the District Court of the United States in and for the Northern District of California, Southern Division. In Admiralty.

No. 21,091-S

Hildegard Schoenamsgruber, by Gustav Schoenamsgruber, her Guardian ad Litem,
Libelant,

vs.

The Motorship "The Oakland", her boilers, engines, etc.

and

The Hamburg American Line, a Corporation,
Libelees.

ORDER DIRECTING PARTIES TO PROCEED TO ARBITRATION AND STAYING TRIAL HEREIN PENDING SUCH ARBITRATION (made after rehearing).

"In the above case, the libelees duly filed notice of motion for an order submitting the entire controversy herein to the German Consul for arbitration and for an order staying trial of the action and further proceedings herein until such arbitration be had and for an order requiring such further proceedings as in the premises may be meet and proper.

"Said motion came on regularly for hearing before the Court on October 2, 1933, J. Hampton Hoge, Esq. and Messrs. Derby, Sharp, Quinby & Tweedt appeared on behalf of the libelees and Vincent Hallinan, Emmett Burns

and S. T. Hogevoll, Esqs. appeared on behalf of libelant.

"Evidence was presented on behalf of both sides and the matter argues orally and in writing. The Court thereupon took the matter under submission and after due consideration made its order granting said motion, and ordering the entire controversy set out in the libel herein be referred to arbitration, directing the parties to proceed to arbitration, and staying further proceedings herein until after such arbitration be had.

"Thereafter libelant moved to vacate said order and for a rehearing on said motion and that the [131] motion for reference to arbitration be resubmitted to the court, and libelant also moved that the court revoke the contract under which libelees had moved to arbitrate. Said motions came on regularly for hearing before the Court on the 25th day of October, 1933, both parties appearing by their proctors.

"Upon the hearing of libelant's motions, libelant oyered further affidavits, and libelees offered in further evidence (both upon libelant's motions and libelees' motion) the depositions taken herein and then on file herein, and the Court, after considering the matter, granted the motion to vacate its previous order and took under submission both libelees' motion to refer to arbitration and libelant's motion to revoke said contract, and upon such submission con-

sidered the testimony introduced by both parties, including the affidavits, pleadings and depositions on file.

"And after considering the original and supplemental arguments of the parties, both written and oral, and the pleadings, affidavits and depositions on file, the court makes its order herein as follows:

"Libelant's motion to revoke said contract should be and is hereby denied, and

"Libelees' motion that the controversy herein be referred to arbitration in accordance with the contract of the parties should be and is hereby granted.

"IT IS HEREBY ORDERED AND DECREED that the entire controversy set out in the libel herein be and the same is hereby submitted to arbitration before E. Baron von Berchen, German Consul at San Francisco, as arbitrator, and the parties hereto are hereby directed to proceed to arbitrate said controversy before said arbitrator. Said arbitrator may withdraw from the court for his use in the arbitration proceedings before him, all pleadings, depositions and other papers on file herein, to be returned to this court with his award herein, unless said pleadings, depositions or other papers are sooner ordered returned by this court and said pleadings, depositions and other papers to be at all times subject to the further orders of the court.

"IT IS FURTHER ORDERED AND DECREED that until such arbitration has been had and the award of the arbitrator filed herein, the trial of the action herein and further proceedings herein are hereby stayed.

"IT IS FURTHER ORDERED AND DECREED that this Court retain jurisdiction of the above entitled action to make such orders and enter such decrees as are required or contemplated by 'The United States Arbitration Act' or otherwise permitted or required by law, and

"IT IS FURTHER ORDERED AND DECREED that the arbitration before said arbitrator shall be conducted [132] as required by said Act and subject to such rules of law as may be applicable.

"Dated, December 5, 1933.

A. F. ST. SURE,
United States District Judge."

3. That the Court erred in holding the parties agreed to arbitrate.

4. That the Court erred in holding that there was a written agreement to arbitrate.

5. That the said United States District Court erred in holding that the above entitled cause was one within the purview of the so-called "United States Arbitration Act" which was subject to be, or could be, submitted to arbitration.

6. That the said United States District Court erred in holding, in substance and effect, that a cer-

tain alleged agreement alleged to have been entered into between Mrs. Leischen Schoenamsgruber, the mother of said libelant, and the Hamburg-American Line, a corporation, one of the libelees above named, on or about the 30th day of October, 1929, for the carriage or transportation by sea of the above named libelant from Hamburg, Germany, to San Francisco, California, was valid or was binding upon the said libelant, a minor, and in holding that said libelant was bound or concluded by any of the terms, provisions or conditions of said alleged contract; that said United States District Court erred in holding, in substance and effect, that the contract referred to in the preceding paragraph of this assignment of errors was ever executed by the mother of said minor or by any person or persons authorized or empowered or legally competent to act for said libelant or on her behalf.

7. That the cause of action as set forth in the articles of the libel on appeal herein, to-wit: a cause of action for [133] criminal assault upon libelant committed by a member of the crew of the respondent vessel and an employee of said respondent corporation, is not a "maritime transaction" as defined by Section 1, of Title 9 of the United States Code, Annotated (Feb. 12, 1925, c. 213, Section 1, 43 Stat. 883), and is not in any wise or in any manner or under any condition subject to arbitration as provided in the said arbitration act or otherwise; that any contract agreeing to submit a claim for damages for such offense to arbitration was, and is, illegal and void and contrary to public

policy and good morals; and the said District Court of the United States erred in holding otherwise.

8. That the purported arbitration agreement hereinabove set forth, which was the basis of the decree and order appealed from, is further null and void and contrary to public policy for the reason that the same is in the words and figures following, to-wit:

> "Complaints with respect to failure to fulfill this contract, claims for damages, etc., must be presented by the passenger immediately after arrival at the overseas port of destination to the agent of the Hamburg-American Line. In the event an agreement cannot be reached thereby, then the decision of the German Consul acting at the port of disembarkation shall be final and his decision shall be accepted, both parties waiving recourse to the courts at law."

that the said purported contract or agreement to arbitrate is not an arbitration agreement at all, but that the same makes the decision of the said German Consul final and waives recourse to Courts of law and is an attempted ouster of the jurisdiction of the Courts; and that for all and singular the reasons aforesaid, the said District Court erred in attempting to enforce the said agreement in said decree.

9. That said District Court had no jurisdiction to make, render or enter the decree complained of.

10. That the said order and decree is further null and void for the reason that the same deprives

libelant of her [134] property without due process of law and denies her the right to have her cause tried, heard and determined by the Courts of the United States.

11. That the said District Court further erred in ordering the submission of said controversy to said German Consul by reason of the fact that it appear from the record and proceedings that the said German Consul was not, and is not, an impartial or indifferent person.

12. That the Court erred in holding that under the Federal Arbitration Act a minor could not disaffirm a so-called arbitration agreement.

WHEREFORE, libelant and appellant prays that the said order and decree be reversed, that a trial of the issues raised by the libel herein and the answer of respondents hereto be tried by a Court of competent jurisdiction and that libelant and appellant have such other and further judgment or order of said Circuit Court of Appeals as may be proper in the premises and that said Circuit Court of Appeals may cause to be done herein what of right and according to the laws and customs of the United States of America ought to be done.

Dated, December 14, 1933.

VINCENT W. HALLINAN,
EMMETT H. BURNS,
S. T. HOGEVOLL,
Proctors for Libelant and Appellant.

[Endorsed]: Filed Dec. 15, 1933, Walter B. Maling, Clerk. [135]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

No. 21092-S

NOW COMES the libelant and appellant, GUSTAV SCHOENAMSGRUBER, and says that in the record and proceedings, as also in that certain decree of the Southern Division of the United States District Court of the Northern District of California, given, made and entered therein on the 5th day of December, 1933, which said decree is entitled "Order Directing Parties to Proceed to Arbitration and Staying Trial Herein Pending Such Artibration (made after re-hearing)" manifest error hath happened to the grievous damage of the said GUSTAV SCHOENAMSGRUBER, the libelant and appellant herein; and said libelant and appellant doth now make, assign and present the following assignment of the errors upon which he will rely in the prosecution of his appeal from said decree and order to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

1. The said District Court of the United States erred in said decree and order in granting the motion of the libelees for an order submitting the entire controversy herein to the German Consul for arbitration and for an order staying trial of the action and further proceedings herein until such arbitration be had and for an order requiring such further proceedings in the [136] premises as may be meet and proper.

2. The said District Court erred in the giving, making, rendering and entering of the said decree, which said decree was, and is, in the words and figures following, to-wit:

"In the District Court of the United States in and for the Northern District of California, Southern Division. In Admiralty.

Gustav Schoenamsgruber,
Libelant,

vs.

The Motor Ship "The Oakland", her Engines, Boilers, etc.,
and

The Hamburg American Line (a corporation),
Libelees.

No. 21092-S

ORDER DIRECTING PARTIES TO PROCEED TO ARBITRATION AND STAYING TRIAL HEREIN PENDING SUCH ARBITRATION.

(made after re-hearing.)

"In the above case, the libelees duly filed notice of motion for an order submitting the entire controversy herein to the German Consul for arbitration and for an order staying trial of the action and further proceedings herein until such arbitration be had and for an

order requiring such further proceedings as in the premises may be meet and proper.

"Said motion came on regularly for hearing before the Court on October 2, 1933, J. Hampton Hoge, Esq. and Messrs. Derby, Sharp, Quinby & Tweedt appeared on behalf of the libelees and Vincent Hallinan, Emmett Burns and S. T. Hogevoll, Esqs. appeared on behalf of libelant.

"Evidence was presented on behalf of both sides and the matter argues orally and in writing. The Court thereupon took the matter under submission and after due consideration made its order granting said motion, and ordering the entire controversy set out in the libel herein be referred to arbitration, directing the parties to proceed to arbitration, and staying further proceedings herein until after such arbitration be had.

"Thereafter libelant moved to vacate said order and for a re-hearing on said motion and that the motion for reference to arbitration be re-submitted to the court, and libelant also moved that the court revoke the contract under which libelees had moved to arbitrate. Said motions came on regularly for [137] hearing before the Court on the 25th day of October, 1933, both parties appearing by their proctors.

"Upon the hearing of libelant's motions, libelant offered further affidavits, and libelees offered in further evidence (both upon libel-

ant's motions and libelees' motion) the depositions taken herein and then on file herein, and the Court, after considering the matter, granted the motion to vacate its previous order and took under submission both libelees' motion to refer to arbitration and libelant's motion to revoke said contract, and upon such submission considered the testimony introduced by both parties, including the affidavits, pleadings and depositions on file.

"And after considering the original and supplemental arguments of the parties, both written and oral, and the pleadings, affidavits and depositions on file, the court makes its order herein as follows:

"Libelant's motion to revoke said contract should be and is hereby denied, and

"Libelees' motion that the controversy herein be referred to arbitration in accordance with the contract of the parties should be and is hereby granted.

"IT IS HEREBY ORDERED AND DECREED that the entire controversy set out in the libel herein be and the same is hereby submitted to arbitration before E. Baron von Berchen, German Consul at San Francisco, as arbitrator, and the parties hereto are hereby directed to proceed to arbitrate said controversy before said arbitrator. Said arbitrator may withdraw from the court for his sue in the arbitration proceedings before him, all

pleadings, depositions and other papers on file herein, to be returned to this court with his award herein, unless said pleadings, depositions or other papers are sooner ordered returned by this court and said pleadings, depositions and other papers to be at all times subject to the further orders of the court.

"IT IS FURTHER ORDERED AND DECREED that until such arbitration has been had and the award of the arbitrator filed herein, the trial of the action herein and further proceedings herein are hereby stayed.

"IT IS FURTHER ORDERED AND DECREED that this Court retain jurisdiction of the above entitled action to make such orders and enter such decrees as are required or contemplated by 'The United States Arbitration Act' or otherwise permitted or required by law, and

"IT IS FURTHER ORDERED AND DECREED that the arbitration before said arbitrator shall be conducted as required by said Act and subject to such rules as may be applicable.

"Dated December 5, 1933.

A. F. ST. SURE,
United States District Judge." [138]

3. That the Court erred in holding the parties agreed to arbitrate.

4. That the Court erred in holding that there was a written agreement to arbitrate.

5. That the said United States District Court erred in holding that the above entitled cause was one within the purview of the so-called "United States Arbitration Act" which was subject to be, or could be, submitted to arbitration.

6. That the said United States District Court erred in holding, in substance and effect, that a certain alleged agreement alleged to have been entered into between Mrs. Leischen Schoenamsgruber, the wife of said libelant, and the Hamburg-American Line, a corporation, one of the libelees above named, on or about the 30th day of October, 1929, for the carriage or transportation by sea of the above named libelant's daughter, HILDEGARD SCHOENAMSGRUBER, from Hamburg, Germany, to San Francisco, California, was valid or was binding upon the said libelant's daughter, a minor, and in holding that said libelant's daughter was bound or concluded by any of the terms, provisions or conditions of said alleged contract; that said United States District Court erred in holding, in substance and effect, that the contract referred to in the preceding paragraph of this assignment of errors was ever executed by the mother of said minor or by any person or persons authorized or empowered or legally competent to act for said libelant's daughter or on her behalf, or on this libelant's behalf.

7. That the cause of action as set forth in the articles of the libel on appeal herein, to-wit: a cause of action for criminal assault upon libelant's daughter, HILDEGARD SCHOENAMSGRUBER, com-

mitted by a member of the crew of the respondent vessel and an employee of said respondent corporation, is not a "maritime transaction" as defined by Section 1, of Title 9 of the United States Code, Annotated (Feb. 12, 1925, c. 213, Section 1, 43 Stat. 883), and is not in any wise or in any manner or under any condition [139] subject to arbitration as provided in the said arbitration act or otherwise; that any contract agreeing to submit a claim for damages for such offense to arbitration was, and is, illegal and void and contrary to public policy and good morals; and the said District Court of the United States erred in holding otherwise.

8. That the purported arbitration agreement hereinabove set forth, which was the basis of the decree and order appealed from, is further null and void and contrary to public policy for the reason that the same is in the words and figures following, to-wit:

> "Complaints with respect to failure to fulfill this contract, claims for damages, etc., must be presented by the passenger immediately after arrival at the overseas port of destination to the agent of the Hamburg-American Line. In the event an agreement cannot be reached thereby, then the decision of the German Consul acting at the port of disembarkation shall be final and his decision shall be accepted, both parties waiving recourse to the courts at law."

that the said purported contract or agreement to arbitrate is not an arbitration agreement at all, but

that the same makes the decision of the said German Consul final and waives recourse to Courts of law and is an attempted ouster of the jurisdiction of the Courts; and that for all and singular the reasons aforesaid, the said District Court erred in attempting to enforce the said agreement in said decree.

9. That said District Court had no jurisdiction to make, render or enter the decree complained of.

10. That the said order and decree is further null and void for the reason that the same deprives libelant of his property without due process of law and denies him the right to have his cause tried, heard and determined by the Courts of the United States.

11. That the said District Court further erred in ordering the submission of said controversy to said German Consul by reason of the fact that it appears from the record and [140] proceedings that the said German Consul was not, and is not, an impartial or indifferent person.

12. That the Court erred in holding that under the Federal Arbitration Act a minor could not disaffirm a so-called arbitration agreement.

WHEREFORE, libelant and appellant prays that the said order and decree be reversed, that a trial of the issues raised by the libel herein and the answer of the respondents hereto be tried by a Court of competent jurisdiction and that libelant and appellant have such other and further judgment or order of said Circuit Court of Appeals as

may be proper in the premises and that said Circuit Court of Appeals may cause to be done herein what of right and according to the laws and customs of the United States of America ought to be done.

Dated, December 14, 1933.

VINCENT W. HALLINAN,
EMMETT R. BURNS,
S. T. HOGEVOLL,
Proctors for Libelant and Appellant.

[Endorsed]: Admission of service refused. Served by leaving copy at office of libelee proctors, Derby, Sharp, Quinby & Tweedt, on 12/15/33.

EMMETT R. BURNS.

Filed Dec. 15, 1933. Walter B. Maling, Clerk. [141]

[Title of Court and Cause.]

AFFIDAVIT OF SERVICE.

No. 21091-S

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO.—ss.

Emmett R. Burns, being first duly sworn, deposes and says:

That he is a citizen of the United States, over the age of eighteen years, and not a party to the within entitled action; that he personally served a copy of the Notice of Appeal and a copy of the Assignment of Errors in the above entitled action on Derby, Sharp, Quinby & Tweedt, Esqs., Proctors

for the Libelees in the above entitled action; by leaving copies of the said Notice of Appeal and Assignment of Errors with the Stenographer in the office of the above named Proctors for the Libelees, at San Francisco, California, on the 15th day of December, 1933, at or about the hour of 9:30 o'clock A. M.; that admission of service on the above papers was refused.

EMMETT R. BURNS.

Subscribed and sworn to before me this 15th day of December, 1933.

[Seal] MIGNON JACOBI,
Notary Public, San Francisco, Calif. [142]

[Endorsed]: Filed Dec. 15, 1933. Walter B. Maling, Clerk. [143]

[Title of Court and Cause.]

AFFIDAVIT OF SERVICE.

No. 21092-S

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO.—ss.

EMMETT R. BURNS, being first duly sworn, deposes and says:

That he is a citizen of the United States, over the age of eighteen years, and not a party to the within entitled action; that he personally served a copy of the Notice of Appeal and a copy of the Assignment of Errors on Derby, Sharp, Quinby & Tweedt, Esqs., Proctors for the Libelees, in the above entitled action; by leaving copies of the said

Notice of Appeal and Assignment of Errors with the Stenographer in the office of the above named Proctors for the Libelees, at San Francisco, Calif., on the 15th day of December, 1933, at or about the hour of 9:30 o'clock A. M.; that admission of service on the above papers was refused.

EMMETT R. BURNS.

Subscribed and sworn to before me this 15th day of December, 1933.

[Seal] MIGNON JACOBI,
Notary Public in and for the City and County of San Francisco, State of California. [144]

[Endorsed]: Filed Dec. 15, 1933. Walter B. Maling, Clerk. [145]

[Title of Court and Cause.]

BOND ON APPEAL.

No. 21091-S

Under Section 1 of Rule 2 of the Rules in Admiralty for the United States Circuit Court of Appeals for the Ninth Circuit.

KNOW ALL MEN BY THESE PRESENTS, that we, HILDEGARD SCHOENAMSGRUBER, by Gustav Schoenamsgruber, her guardian ad litem, as principal, and Fred Fournier and John Wilmans as sureties, are held and firmly bound unto THE MOTORSHIP, "THE OAKLAND", and THE HAMBURG AMERICAN LINE, a Corporation, in the full and just sum of two hundred and fifty

(250) dollars to be paid to the said THE MOTORSHIP, "THE OAKLAND", and THE HAMBURG AMERICAN LINE, a Corporation, their successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 15th day of December, in the year of Our Lord One Thousand Nine Hundred and Thirty-three.

WHEREAS, lately at a District Court of the United States for the Northern District of California, in a suit pending in the Admiralty side of said Court, between HILDEGARD SCHOENAMSGRUBER, by Gustav Schoenamsgruber, her guardian ad litem, libelant, versus, THE MOTORSHIP, "THE OAKLAND", her boilers, engines, tackles, [146] apparel, furniture, et cetera, and THE HAMBURG AMERICAN LINE, a Corporation, Libelees, a certain decree was rendered against the said HILDEGARD SCHOENAMSGRUBER, on or about the 5th day of December, 1933, which said decree is entitled: "Order Directing Parties to Proceed to Arbitration and Staying Trial Herein Pending such Arbitration (made after re-hearing)"; and the said HILDEGARD SCHOENAMSGRUBER, by her guardian ad litem aforesaid, having duly and regularly appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from the said decree and from the whole thereof;

Now, the condition of the above obligation is such, that if the said HILDEGARD SCHOENAMSGRUBER, by Gustav Schoenamsgruber, her guardian ad litem, as aforesaid, shall prosecute her said appeal to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; also to remain in full force, virtue and effect.

This recognizance shall be deemed and construed to contain the "Express Agreement" for summary judgment, and execution thereon, mentioned in rule 34 of the District Court.

[Seal] GUSTAV SCHOENAMSGRUBER,
[Seal] FRED FOURNIER,
[Seal] JOHN WILMAN.

Acknowledged before me the day and year first above written.

[Seal] ERNEST WILLIAMS,
U. S. Commissioner, Northern
District of California at S. F.

Acknowledged and approved as to Principal and Sureties.

[Seal] ERNEST E. WILLIAMS,
U. S. Commissioner, Northern
District of California at S. F.

[147]

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF CALIFORNIA.—ss.

Fred Fournier, whose name is subscribed to the foregoing undertaking as one of the sureties thereof, being first duly sworn, deposes and says:

That I am a householder in said district and reside at No. 632 46th Ave., in the city of San Francisco, State of California, and by occupation Retired.

That I am worth the sum of Two Hundred Fifty and no/100 Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and liabilities and exclusive of property exempt from execution, and that my property, now standing of record in my name, consists in part as follows:

Real estate, consisting of Apt. House at 956 Sacramento St. worth $75,000.00; Hotel 949 Clay St. worth $25,000.00.

That the encumbrances on the foregoing property are as follows: $30,000.00 against above properties.

That my total net assets, above all liabilities and obligations on other bonds, is the sum of over $50,000.00.

That I am surety upon outstanding penal bonds, now in force, aggregating total penalty $5750.00.

That above is no separate property.

FRED FOURNIER. [Seal]

Subscribed and sworn to before me this 15th day of December, A. D. 1933.

ERNEST E. WILLIAMS,
United States Commissioner for the
Northern District of California.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF CALIFORNIA.—ss.

John Wilmans, whose name is subscribed to the foregoing undertaking as one of the sureties thereof, being first duly sworn, deposes and says:

That I am a householder in said district and reside at No. 618 15th Ave., in the city of San Francisco, State of California, and by occupation Broker.

That I am worth the sum of Two Hundred Fifty and no/100 Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and liabilities and exclusive of property exempt from execution, and that my property, now standing of record in my name, consists in part as follows:

Real estate, consisting of Flats and store 629 Fillmore St., worth $25,000.00.

That the encumbrances on the foregoing property are as follows: $9000.00.

That my total net assets, above all liabilities and obligations on other bonds, is the sum of over $15,000.00.

That I am surety upon outstanding penal bonds, now in force, aggregating total penalty $450.00.

JOHN WILMANS. [Seal]

Subscribed and sworn to before me this 15th day of December, A. D. 1933.

ERNEST E. WILLIAMS,
United States Commissioner for the
Northern District of California.

APPROVED:
HAROLD LOUDERBACK,
United States District Judge.

Filed Dec. 19, 1933. Walter B. Maling, Clerk.

[148]

[Title of Court and Cause.]

NOTICE OF FILING BOND ON APPEAL.

No. 21091-S

To: The Motorship, "The Oakland", and The Hamburg American Line, a Corporation, Libelees; and to J. Hampton Hoge, Esq., and Messrs. Derby, Sharp, Quinby & Tweedt, Esqs., Proctors for the said Libelees:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE, and you are hereby notified that the libelant and appellant, above named, having heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain order and decree of the above-entitled Court, given, made and entered herein on the 5th day of December, 1933, which said decree is entitled: "Order Directing Parties to Proceed to Arbitration and Staying Trial Herein Pending Such Arbitration" (made

after rehearing), and from the whole of said decree, has filed in the clerk's office of the Southern Division of the District Court of the United States, for the Northern District of California, a bond for costs on said appeal, with sufficient sureties in the sum of two hundred and fifty (250) dollars, conditioned that the said appellant and libelant shall prosecute her appeal and pay the costs if the appeal is not sustained, and that the said bond [149] was filed within ten (10) days after filing the notice of said appeal; and

YOU ARE FURTHER NOTIFIED that the names and residences of the sureties on said bond are as follows, to-wit:

Names	Residences
FRED FOURNIER,	632 46th Ave., San Francisco.
JOHN WILMANS,	618 15th Ave., San Francisco.

Dated this 15th day of December, 1933.

VINCENT W. HALLINAN,
EMMETT R. BURNS,
S. T. HOGEVOLL,
Proctors for Libelant and Appellant.

[Endorsed]: Filed Dec. 20, 1933. Walter B. Maling, Clerk. [150]

[Title of Court and Cause.]

NOTICE OF FILING BOND ON APPEAL.

No. 21092-S

To: The Motorship, "The Oakland", and The Hamburg American Line, a Corporation, Libelees; and to J. Hampton Hoge, Esq., and Messrs. Derby, Sharp, Quinby & Tweedt, Esqs., Proctors for the said Libelees:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE, and you are hereby notified that the libelant and appellant, above named, having heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain order and decree of the above-entitled Court, given, made and entered herein on the 5th day of December, 1933, which said decree is entitled: "Order Directing Parties to Proceed to Arbitration and Staying Trial Herein Pending Such Arbitration" (made after rehearing), and from the whole of said decree, has filed in the clerk's office of the Southern Division of the District Court of the United States, for the Northern District of California, a bond for costs on said appeal, with sufficient sureties in the sum of two hundred and fifty (250) dollars, conditioned that the said appellant and libelant shall prosecute his appeal and pay the costs if the appeal is not sustained, and that the said bond was filed within ten (10) days after filing the notice of said [151] appeal; and

YOU ARE FURTHER NOTIFIED that the names and residences of the sureties on said bond are as follows, to-wit:

Names Residences

FRED FOURNIER, 632 46th Ave., San Francisco.
JOHN WILMANS, 618 15th Ave., San Francisco.

Dated this 15th day of December, 1933.

VINCENT W. HALLINAN,
EMMETT R. BURNS,
S. T. HOGEVOLL,
Proctors for Libelant and Appellant.

[Endorsed]: Admission of service refused. Served by leaving copy at office of Derby, Sharp, Quinby & Tweedt on 12/20/33 by myself.

EMMETT R. BURNS.

Filed Dec. 20, 1933. Walter B. Maling, Clerk. [152]

[Title of Court and Cause.]

ORDER GRANTING SUPERSEDEAS AND STAYING PROCEEDINGS ON ORDER APPEALED FROM PENDING APPEAL.

No. 21091-S

WHEREAS, on the 5th day of December, 1933, in a cause as above entitled, pending in this Court, a certain Order and Decree was given, made and entered in and by this Court, which said Order or Decree was and is entitled: "Order Directing Parties to Proceed to Arbitration and Staying Trial Herein Pending Such Arbitration (made after re-hearing)"; and

WHEREAS, on the 15th day of December, 1933, the above named libelant, by her guardian ad litem,

above named, duly served and filed herein her NOTICE OF APPEAL from said Decree or Order, in due form of law, together with her assignment of the errors upon which said libelant and appellant will rely in her prosecution of the said appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and

WHEREAS, on the day last aforesaid, the said libelant and appellant duly filed herein her bond for costs upon said appeal, all of which from the record and proceedings on file herein fully and at large appears;

NOW, THEREFORE, it is hereby ordered that pending the hearing and determination of the said appeal by the said United [153] States Circuit Court of Appeals for the Ninth Circuit, all proceedings on or in execution of the Order appealed from, as aforesaid, be, and the same are hereby stayed, and it is further ordered that pending the hearing and determination of the said appeal by the said United States Circuit Court of Appeals, E. VON BERCHEN, Acting German Consul General at San Francisco, be, and he is hereby required and ordered to desist and refrain from any and all further proceedings under or by virtue of the said Order or Decree appealed from, as aforesaid, and to desist and refrain from the hearing or trial of each and every, all and singular, the matters and things submitted to him, the said Acting German Consul, under and by virtue of the aforesaid Order appealed from, as aforesaid.

Dated, this 16th day of December, 1933.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed Dec. 18, 1933. Walter B. Maling, Clerk. [154]

[Title of Court and Cause.]

STIPULATION (AND ORDER FOR ONE TRANSCRIPT ON APPEAL).

No. 21091-S
No. 21092-S

IT IS HEREBY STIPULATED between the respective parties hereto and by their proctors that the one record will cover both cases and that it will be unnecessary to prepare two transcripts and that the transcript in "Hildegard Schoenamsgruber, by Gustav Schoenamsgruber, her Guardian ad litem, Libelant, vs. The Motor Ship The Oakland, etc., Libelees", No. 21091-S may be used in the case of "Gustav Schoenamsgruber, Libelant, vs. The Motor-Ship 'The Oakland', etc., et al., Libelees", No. 21092-S.

Dated, January 12th, 1934. [155]

VINCENT W. HALLINAN,
EMMETT R. BURNS,
Proctors for Libelants.
J. HAMPTON HOGE,
DERBY, SHARP, QUINBY & TWEEDT,
Proctors for Libelees.

SO ORDERED:
A. F. ST. SURE,
D. J.

[Endorsed]: Filed Jan. 15, 1934. Walter B. Maling, Clerk. [156]

[Title of Court and Cause.]

PRAECIPE.
No. 21091-S

To the Clerk of said Court:

Sir:

Please prepare apostles on appeal to include the following:

The libel in rem and in personam against "The Oakland" and the Hamburg American Line.

Petition for appointment of guardian ad litem.

Order appointing guardian ad litem.

Minute order consolidating two cases made on stipulation in open court.

Answer to libels.

Notice of association of proctors for Libelees.

Affidavit of Emil A. Winkler in support of motion to refer to arbitration.

Affidavit of E. Baron Von Berchen in support of motion to submit to arbitration; also affidavit of John D. Schroeder on same motion for arbitration.

Also affidavit of J. Hampton Hoge on motion to arbitrate, including two page exhibit attached to said affidavit. [157]

Written objection to making of motion to arbitrate.

Affidavit of Emmett Burns in opposition to motion to arbitrate—sworn to October 2nd, 1933.

Affidavit of Louise Schoenamsgruber in opposition to motion to arbitrate—sworn to on Oct. 2nd, 1933.

Affidavit of Gustav Schoenamsgruber—sworn to Oct. 2nd, 1933, re same motion.

Second affidavit of Emmett Burns on same motion; also sworn to on Oct. 2nd, 1933.

Copy of contract with purchaser, the original of which was filed in open court on or about Oct. 2nd, 1933.

Letter of December 27th, 1932, filed as exhibit by Libelant at hearing of motion.

Copy of minute order of October 11th, 1933, granting motion to arbitrate.

Order directing case to arbitration made October 17th, 1933.

Written exception to order directing cases to arbitration.

Notice of motion for order vacating order of court directing parties to arbitration.

Notice of motion for re-hearing of motion to arbitrate.

Notice of motion for revocation of arbitration contract so called.

Petition for rehearing of motion to arbitrate.

Petition for revocation of arbitration contract.

Affidavit of Louise Schoenamsgruber signed Oct. 25, 1933, on said motions.

Affidavit of Gustav Schoenamsgruber signed Oct. 25, 1933, on said motions.

Order vacating order of Oct. 17th, 1933, directing case to arbitration, made on October 26th, 1933. [158]

Order vacating minute order of October 11th, 1933, directing cases to arbitration.

Order directing parties to arbitration made after rehearing and issued on December 5th, 1933.

Libelants' exception to order to arbitrate.

Demands of Libelants for Finding of Facts and Conclusions of Law on various motions made.

Minute order of court denying Demands of Libelants for Findings of Facts and Conclusions of law on various motions, and Libelants' Exceptions thereto.

Notice of Appeal from order.

Assignment of Errors on appeal.

Affidavit of Service of Notice of Appeal and Assignment of Errors.

Bond on appeal with justification of Sureties by Commissioner Williams.

Notice of filing bond on appeal.

Order Granting supersedeas and staying German Counsel from hearing case.

Interrogatories and cross-interrogatories and answers of Carl Friederich Victor Newman and Gustav Korries with attached Exhibits, and Libelants' Exceptions.

VINCENT W. HALLINAN,
EMMETT R. BURNS,
Proctors for Libelant.

[Endorsed]: Filed Jan. 12, 1934. Walter B. Maling, Clerk. [159]

[Title of Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL.

I, WALTER B. MALING, Clerk of the United State District Court, for the Northern District of California, do hereby certify that the foregoing 159 pages, numbered from 1 to 159, inclusive, contain a full, true, and correct transcript of the records and proceedings in the cases of Hildegard Schoenamsgruber, etc., vs. The Motorship "The Oakland", etc., No. 21091-S and Gustav Schoenamsgruber vs. The Motorship "The Oakland", etc., No. 21092-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Thirty Seven Dollars and Seventy Cents ($37.70) and that the said amount has been paid to me by the Attorney for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 31st day of January, A. D. 1934.

[Seal] WALTER B. MALING,
Clerk.

By C. M. TAYLOR,
Deputy Clerk.

No. 7388

United States

Circuit Court of Appeals

For the Ninth Circuit

HILDEGARD SCHOENAMSGRUBER,
by GUSTAV SCHOENAMSGRUBER, her Guardian,

Appellant,

vs.

THE HAMBURG AMERICAN LINE, a Corporation, Claimant of the Motorship "THE OAKLAND", her Engines, etc.,

Appellee,

and

GUSTAV SCHOENAMSGRUBER,

Appellant,

vs.

THE HAMBURG AMERICAN LINE, Corporation, Claimant of the Motorship "THE OAKLAND", her Engines, etc.,

Appellee.

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

In the United States Circuit Court of Appeals for the Ninth Circuit. In Admiralty.

No. 7388

HILDEGARD SCHOENAMSGRUBER,
by Gustav Schoenamsgruber, her Guardian ad Litem,

Libelant and Appellant,

vs.

The Motorship "THE OAKLAND", her Boilers, Engines, etc.,

and

THE HAMBURG AMERICAN LINE, a Corporation,

Libelees and Appellees.

GUSTAV SCHOENAMSGRUBER,

Libelant and Appellant,

vs.

The Motorship "THE OAKLAND", her Engines, Boilers, etc.,

and

THE HAMBURG AMERICAN LINE, a Corporation,

Libelees and Appellees.

MOTION TO DISMISS APPEAL.
NOTICE OF HEARING OF MOTION TO DISMISS APPEAL.
POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS APPEAL.

[Title of Court and Cause.]

MOTION TO DISMISS APPEAL.

Come now the appellees and libelees above named and move the above entitled court for its order dismissing the purported appeal of the appellants and libelants herein in each of the above entitled matters.

This motion is based on the ground that this Court has no jurisdiction over the purported appeals herein and upon the further ground that the orders appealed from are not final or otherwise appealable orders, decrees, judgments or decisions and upon the grounds set out in the Points and Authorities annexed hereto.

Said motion will be based on all the records, papers and files herein (including the apostles on appeal on file herein and the matters therein set forth), on this motion and the notice thereof and Points and Authorities in support thereof attached hereto.

A brief statement of the facts involved in this motion are as follows: The libels filed in the proceedings below were based on an alleged breach of contract to carry certain passengers safely from Germany to San Francisco. Said contract contained a clause requiring the parties to refer to arbitration any claims for damages or alleged breach of contract. Pursuant to the provision in said contract and pursuant to the United States Arbitration Act (9 U. S. Code §8) the trial court entered an order staying further proceedings before

it and directing the parties to proceed to arbitration as required by their contract.

Appellants refused to abide by said order and no hearing has been had before any arbitrator and no arbitration proceedings have been had.

No final order or decree has been made or entered by the court below nor has any interlocutory decree determining the rights or liabilities of the parties been made or entered in the court below.

The object of this motion is to secure an order dismissing the purported appeals herein.

Dated, February 20, 1934.

J. HAMPTON HOGE,
DERBY, SHARP, QUINBY & TWEEDT,
Proctors for Appellees (Libelees).

[Title of Court and Cause.]

NOTICE OF HEARING OF MOTION TO DISMISS APPEAL.

To the Libelants and Appellants in the above entitled actions and to their respective counsel:

You will please take notice that on Monday, February 26, 1934, at the hour of 10 A. M., or as soon thereafter as counsel can be heard, in the court room of the above entitled court at the court house in the Federal Building, 7th and Mission Streets, San Francisco, California, appellees (libelees and respondents) will call up for hearing and determination the motion which is attached hereto and by this reference expressly made a part hereof and incorporated as a part of this notice.

At said time libelees will move the above entitled court for its order dismissing the appeal herein and will make such motion on the grounds and upon the papers referred to in the said motion.

Dated, February 20, 1934.

J. HAMPTON HOGE,
DERBY, SHARP, QUINBY & TWEEDT,
Proctors for Libelees (Appellees).

Filed Feb. 20, 1934. Paul P. O'Brien, Clerk.

At a stated term, to wit, the October Term, A. D. 1933, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the twenty-sixth day of February in the year of our Lord One Thousand Nine Hundred and Thirty-four.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge; Honorable FRANCIS A. GARRECHT, Circuit Judge.

[Title of Court and Cause.]

ORDER SUBMITTING MOTION TO TAKE NEW TESTIMONY, AND MOTION TO DISMISS.

ORDERED motion of appellant to take new and further testimony, and motion of appellee to dismiss appeal, argued by Mr. Emmett R. Burns, proc-

tor for appellant, and by Mr. Joseph Sharp, proctor for appellee, and submitted to the court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1933, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Tuesday the tenth day of April in the year of our Lord One Thousand Nine Hundred and Thirty-four.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge; Honorable FRANK H. NORCROSS, District Judge.

[Title of Court and Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREES.

By direction of the court, ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that decrees be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

Before: WILBUR, SAWTELLE and GARRECHT, Circuit Judges.

WILBUR, Circuit Judge:

Two libels were filed in rem against the motorship "Oakland", and in personam against the Hamburg American Line, a corporation, as owner of the motorship "Oakland". One of the libels was brought by Hildegard Schoenamsgruber, a minor, by Gustav Schoenamsgruber as her guardian ad litem, for $250,000 damages and the other was brought by Gustav Schoenamsgruber on behalf of himself and his wife as the parents of said minor child for $50,000 damages. Both libels are based upon an alleged breach of a maritime contract for the carriage of the minor child, Hildegard Schoenamsgruber, from Hamburg, Germany, to San Francisco, California. The alleged breach consisted of the alleged misconduct of a certain chief cook aboard ship resulting in the infection of the six-year old daughter with a venereal disease.

The libellees, in addition to denying the allegations of the libels, allege that the contract of transportation was entered into with the mother of the minor child and that it contained an agreement to

arbitrate any complaints based upon a breach of the terms of the contract. The agreement was as follows:

> "Complaints with respect to failure to fulfill this contract, claims for damages, etc., must be presented by the passenger immediately after arrival at the overseas port of destination to the agent of the Hamburg-American Line. In the event an agreement cannot be reached thereby, then the decision of the German Consul acting at the port of disembarkation shall be final and his decision shall be accepted, both parties waiving recourse to the courts at law."

The two libels were consolidated for trial and on December 5, 1933, the trial Court made an order referring the controversy to the German Consul at San Francisco as arbitrator and directed that the proceeding be stayed pending the arbitration, and further provided:

> "It is further ordered and decreed that this court retain jurisdiction of the above entitled action to make such orders and enter such decrees as are required or contemplated by the United States arbitration law, or otherwise permitted or required by law."

This order was evidently based upon 9 U. S. C. A. §8, which is as follows:

> "Proceedings begun by libel in admiralty and seizure of vessel or property. If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding

anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award."

On the 14th day of December notice of appeal from this order was given.

The libellees moved for dismissal of the appeal on the ground that the order appealed from is not an appealable order because it is not final in the proceedings. It is interlocutory and not such an interlocutory order as is appealable. (28 U. S. C. A., §§225, 227.) The order consequently is not appealable. O'Brien, Manual of Federal Appellate Procedure (2d ed.), p. 60, and 1933 Supplement, p. 38; 1 Benedict on Admiralty (5th ed.), p. 639, §533; France & Canada S. S. Co. v. French Republic, 285 Fed. 290, 292-4; 1 C. J. 1345; 28 U. S. C. A. §227; Cox v. Graves, 55 F. (2d) 217, 218; Gardner v. Grand Beach Co., 29 F. (2d) 481, 482; Waialua Agr. Co. v. Christian, 52 F. (2d) 847. In California Prune & Apricot Growers' Assn. v. Catz American Co., 60 F. (2d) 788, we entertained an appeal from an order of the District Court directing the submission of a controversy to arbitrators under the California State Arbitration Act, the jurisdiction of the Federal Court having been invoked be-

cause of the diversity of citizenship. We reversed the order upon the merits. No motion was made in the case for dismissal of the appeal nor was it contended that the order was interlocutory. The petition in that case was for an order directing the parties to proceed to arbitrate in accordance with the terms of the agreement and the order of the District Court directed "that the parties hereto be and they are hereby summarily directed to proceed with the arbitration in accordance with the terms thereof." The contract in that case provided that "any disputes arising under this agreement to be settled by friendly arbitration before the Dried Fruit Association of California". The order on its face appeared to be a final order and was treated as such by the parties and by the Court. It was based on §1282 of the California Code of Civil Procedure providing for a special and summary proceeding to procure an order for arbitration. Such an order under similar statute has been held to be a final order by the Court of Appeals of the State of New York. Marchant v. Meed Mfg. Co., 252 N. Y. 284, 169 N. E. 386. Hosiery Mfg. Co. v. Goldston, 238 N. Y. 22, 143 N. E. 779. It is not necessary for us in this case to consider or determine whether or not in a special proceeding an order for arbitration under the terms of the contract and under a state or federal arbitration law is a final order appealable to this Court, for we are here considering an order for arbitration made in the course of litigation inaugurated by the libel-

lant under the general law in which the defendant set up the existence of an agreement for arbitrating the controversy and in such case the proper proceeding is outlined by the United States Arbitration Act (9 U. S. C. A. §8) supra, and the arbitration order is clearly interlocutory.

The order in the case at bar is interlocutory in its character and is in accord with the statute which expressly provides that the order is to be followed by a proper decree. The brief of the libellant and appellant is largely devoted to the contention that the arbitration agreement is not binding upon the libellant, but that question is not before us. The appeal is premature. The libellant has made a motion to introduce new testimony but this cannot be considered in view of the fact that we have no jurisdiction of the case.

Appeal dismissed.

[Endorsed]: Opinion. Filed Apr. 10, 1934. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit.

No. 7388

HILDEGARD SCHOENAMSGRUBER, by GUSTAV SCHOENAMSGRUBER, her guardian,

Appellant,

vs.

THE HAMBURG AMERICAN LINE, a Corp., Claimant of the Motorship "THE OAKLAND", etc.,

Appellee.

DECREE OF DISMISSAL.

APPEAL from the District Court of the United States for the Northern District of California, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and upon motion of appellant to take new testimony, and motion of appellee to dismiss appeal and was duly submitted;

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged, and decreed by this Court, that the motion of appellee to dismiss the appeal in this cause be, and hereby is, granted, and that the appeal in this cause be, and hereby is dismissed, with costs in favor of the appellee and against the appellant.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by this Court, that the appellee

recover against the appellant for its costs herein expended, and have execution therefor.

[Endorsed]: Decree of Dismissal filed and entered April 10, 1934. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit.

No. 7388

GUSTAV SCHOENAMSGRUBER,

Appellant,

vs.

THE HAMBURG AMERICAN LINE, a Corp., Claimant of the Motorship "THE OAKLAND", etc.,

Appellee.

DECREE OF DISMISSAL.

APPEAL from the District Court of the United States for the Northern District of California, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and upon motion of appellant to take new testimony, and motion of appellee to dismiss appeal and was duly submitted;

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged, and decreed by this Court,

that the motion of appellee to dismiss the appeal in this cause be, and hereby is, granted, and that the appeal in this cause be, and hereby is dismissed, with costs in favor of the appellee and against the appellant.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by this Court, that the appellee recover against the appellant for its costs herein expended, and have execution therefor.

[Endorsed]: Decree of dismissal filed and entered April 10, 1934. Paul P. O'Brien, Clerk.

At a stated term, to wit, the October Term A. D. 1933, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the eleventh day of July, in the year of our Lord One Thousand Nine Hundred and Thirty-four.

PRESENT:

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge; Honorable FRANCIS A. GARRECHT, Circuit Judge.

[Title of Court and Cause.]

ORDER DENYING PETITION FOR A REHEARING.

Upon consideration of the petition of appellants, filed May 10, 1934, for a rehearing of above cause, and of reply of appellee thereto, filed June 29, 1934, and of closing brief of appellants, filed July 6, 1934, and by direction of the court, IT IS ORDERED that the petition of appellants, be, and hereby is denied.

[Title of Court and Cause.]

ORDER GRANTING STAY OF MANDATE.

Upon reading the petition of proctor for the appellants in the above entitled cause, and good cause appearing therefor,

IT IS ORDERED that the issuance, under Rule 32, from the mandate of this court in the above entitled cause, be, and the same is hereby stayed to and including the 29th day of September, 1934, and in the event the petition for a writ of certiorari to be made by the appellants herein, be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this court is to be stayed until after the said Supreme Court passes on the said petition.

CURTIS D. WILBUR,
Senior United States Circuit Judge.

[Endorsed]: Filed Apr. 28, 1934. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and seventy-two (172) pages, numbered from and including 1, to and including 172, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals made pursuant to request of proctors for the appellants and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 14th day of September, A. D. 1934.

[Seal] PAUL P. O'BRIEN,
Clerk.

[Endorsed]: No. 7388. United States Circuit Court of Appeals for the Ninth Circuit. Hildegard Schoenamsgruber, by Gustav Schoenamsgruber, her guardian, Appellant, vs. The Hamburg American

Line, a Corporation, claimant of the Motorship "The Oakland", her engines, etc., Appellee, and Gustav Schoenamsgruber, Appellant, vs. The Hamburg American Line, a Corporation, claimant of the Motorship "The Oakland", her engines, etc., Appellee. Apostles on Appeals. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed January 31, 1934.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

[fol. 173] SUPREME COURT OF THE UNITED STATES

October Term, 1934

No. 424

ORDER ALLOWING CERTIORARI—Filed October 22, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 174] SUPREME COURT OF THE UNITED STATES

October Term, 1934

No. 425

ORDER ALLOWING CERTIORARI—Filed October 22, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

In the Supreme Court

OF THE

United States

FILED
SEP 28 19

OCTOBER TERM, 1934

No.

HILDEGARD SCHOENAMSGRUBER, by Gustav Schoenamsgruber, her guardian,
Petitioner,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland", her engines, etc.,
Respondent,

and

GUSTAV SCHOENAMSGRUBER,
Petitioner,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland", her engines, etc.,
Respondent.

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PETITION FOR A WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

HARRY H. SEMMES,
VINCENT W. HALLINAN,
EMMETT R. BURNS,
WILLIAM F. HERRON,
369 Pine Street, San Francisco, California,
Proctors for Petitioners.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1934

No.

HILDEGARD SCHOENAMSGRUBER, by Gustav Schoenamsgruber, her guardian,
Petitioner,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland", her engines, etc.,
Respondent,

and

GUSTAV SCHOENAMSGRUBER,
Petitioner,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland", her engines, etc.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit,

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of Hildegard Schoenamsgruber by Gustav Schoenamsgruber and Gustav Schoenamsgruber, the petitioners above named, respectfully shows to Your Honors:

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

There could be no better or more concise statement of the matter involved than that of the Circuit Court of Appeals in the opinion written in this cause by Judge Wilbur (Apostles on Appeal, page 162, 70 Fed. (2d) 234), which is as follows:

"Two libels were filed in rem against the motorship 'Oakland', and in personam against the Hamburg American Line, a corporation, as owner of the motorship 'Oakland'. One of the libels was brought by Hildegard Schoenamsgruber, a minor, by Gustav Schoenamsgruber as her guardian ad litem, for $250,000 damages, and the other was brought by Gustav Schoenamsgruber on behalf of himself and his wife as the parents of said minor child for $50,000 damages. Both libels are based upon an alleged breach of a maritime contract for the carriage of the minor child, Hildegard Schoenamsgruber, from Hamburg, Germany, to San Francisco, California. The alleged breach consisted of the alleged misconduct of a cer-

tain chief cook aboard ship resulting in the infection of the six-year old daughter with a venereal disease.

"The libellees, in addition to denying the allegations of the libels, allege that the contract of transportation was entered into with the mother of the minor child and that it contained an agreement to arbitrate any complaints based upon a breach of the terms of the contract. The agreement was as follows:

'Complaints with respect to failure to fulfill this contract, claims for damages, etc., must be presented by the passenger immediately after arrival at the overseas port of destination to the agent of the Hamburg American Line. In the event an agreement cannot be reached thereby, then the decision of the German Consul acting at the port of disembarkation shall be final and his decision shall be accepted, both parties waiving recourse to the Courts at law.'

"The two libels were consolidated for trial and on December 5, 1933, the trial Court made an order referring the controversy to the German Consul at San Francisco as arbitrator and directed that the proceeding be stayed pending the arbitration, and further provided:

'It is further ordered and decreed that this Court retain jurisdiction of the above entitled action to make such orders and enter such decrees as are required or contemplated by the United States arbitration law, or otherwise permitted or required by law.'

"This order was evidently based upon 9 U. S. C. A., Sec. 8, which is as follows:

'Proceedings begun by libel in admiralty and seizure of vessel or property. If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the Court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.'

"On the 14th day of December, notice of appeal from this order was given.

"The libellees moved for dismissal of the appeal on the ground that the order appealed from is not an appealable order because it is not final in the proceedings."

The Circuit Court of Appeals held that the order directing the parties to proceed to arbitration was a non-appealable interlocutory order and entered a decree dismissing the appeal in each case. (Apostles on Appeal, pages 167, 168.)

Believing that this decision of the Circuit Court of Appeals was error, your petitioners pray for a writ of certiorari to review the same.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) That the Honorable Circuit Court of Appeals has entered a decision herein in conflict with the decision of another Circuit Court of Appeals on the same matter; to-wit, the decision of the Circuit Court of Appeals for the Second Circuit in *Krauss Bros. v. Bossert & Sons,* 62 Fed. (2d) 1004,

"that the decree is final and appealable."

(See Rule 38, Sec. 5, Subd. B of the Rules of the Supreme Court.) That in a previous decision in *California Prune and Apricot Growers Ass'n v. Catz American Co.,* 60 Fed. (2d) 788, the Circuit Court of Appeals for the Ninth Circuit, which rendered the decision sought to be reviewed, treated an order directing the submission of a controversy to arbitration as a final order and disposed of the question on the merits, though it did not directly pass upon the question of the appealability of the order.

(2) That the said Circuit Court of Appeals has decided an important question of general law in a way probably untenable, and in conflict with the weight of authority in this, to-wit: that the only cases cited in the opinion of the Circuit Court of Appeals involving the appealable character of an order directing the parties to proceed to arbitration, pronounce a rule opposite to the decision of the Circuit Court of Appeals in the instant case, and reach a contrary conclusion. (See Justice Cardozo's opinion in *Marchant v. Mead Mfg. Co.,* 252 N. Y. 284, 169 N. E. 386,

and *Hosiery Mfg. Co. v. Goldston,* 238 N. Y. 22, 143 N. E. 779.)

(3) That the said Circuit Court of Appeals in the decision aforesaid, has decided an important question of Federal law which has not been, but should be, settled by this Court; to-wit, whether a decree in admiralty directing the parties to proceed to arbitration is a final and appealable or an interlocutory and non-appealable order.

(4) That the said Circuit Court of Appeals has so far departed from the accepted and usual course of judicial procedure and has so far sanctioned such a departure by a lower Court as to call for an exercise of this Court's power of supervision, to-wit, that said Circuit Court of Appeals by treating the order of the District Court as non-appealable, has sanctioned an order of the District Court, which, in effect, decrees the specific performance of a purported arbitration provision which is void on its face, because it shows on its face that it is an attempt to oust the Courts of their jurisdiction.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding the said Circuit Court of Appeals to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cases entitled as above, and that the said decree of said Circuit Court of Appeals may

be reversed by this Honorable Court, and that your petitioners may have such other and further relief as to this Honorable Court may seem meet, just and proper in the premises; and your petitioners will ever pray.

Dated, San Francisco, California,
September 19, 1934.

HILDEGARD SCHOENAMSGRUBER,
By Gustav Schoenamsgruber,
her guardian,
GUSTAV SCHOENAMSGRUBER,
Petitioners.

HARRY H. SEMMES,
VINCENT W. HALLINAN,
EMMETT R. BURNS,
WILLIAM F. HERRON,
Proctors for Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for the petitioners in the above entitled cause and that in my judgment the foregoing petition is well founded in point of law, as well as in fact, and that said petition is not interposed for delay.

Dated, San Francisco, California,
September 19, 1934.

HARRY H. SEMMES,
Of Counsel for Petitioners.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1934

No.

HILDEGARD SCHOENAMSGRUBER, by Gustav Schoenamsgruber, her guardian,

Petitioner,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland", her engines, etc.,

Respondent,

and

GUSTAV SCHOENAMSGRUBER,

Petitioner,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland", her engines, etc.,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

DATE OF JUDGMENT OF TRIAL COURT.

The judgment of the trial Court (Order Directing Parties to Proceed to Arbitration) was entered December 5, 1933. (Apostles on Appeal, page 9.)

II.

THE OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals was rendered April 10, 1934, and is cited in the Federal Reporter in 70 Fed. (2d) 234, and in the transcript of the record (Apostles on Appeal) at page 162.

III.

DATE OF JUDGMENT OF APPELLATE COURT.

The judgment of the Appellate Court (Decree of Dismissal) was entered April 10, 1934. (Apostles on Appeal, pages 168, 169.)

A petition for a rehearing was filed, and the date of the denial thereof is the 11th of July, 1934. (Apostles on Appeal, pages 169, 170.)

IV.

THE JURISDICTION.

The statutory provision under which jurisdiction is invoked is Section 240 of the Judicial Code, 28 U. S. C. A., Section 347.

V.

STATEMENT OF THE CASE.

A full statement of the case has been given under a like heading in the petition, and, in the interest of brevity, the statement is not repeated at this point.

VI.

SPECIFICATION OF ERRORS.

(1) The Honorable Circuit Court of Appeals erred in holding and deciding that the order or decree of the District Court directing the parties to proceed to arbitration was an interlocutory and non-appealable order.

(2) The Circuit Court of Appeals erred in holding and deciding that because the question was not before it, it could not consider the contention of the libelant and appellant that the so-called arbitration agreement was void on its face, and was not binding upon the libelant.

VII.

ARGUMENT.

SUMMARY OF ARGUMENT.

I. THE DECISION BELOW IS CONTRARY TO AND IN CONFLICT WITH ALL THE PRIOR FEDERAL AND STATE COURT DECISIONS TOUCHING THE APPEALABLE CHARACTER OF A DECREE DIRECTING THE PARTIES TO PROCEED TO ARBITRATION.

II. THE DECISION BELOW IGNORES THE WELL SETTLED AND UNIVERSAL PRINCIPLE OF GENERAL LAW THAT AN AGREEMENT TO ARBITRATE, WHICH ON ITS FACE ATTEMPTS TO OUST THE COURTS OF THEIR JURISDICTION, IS VOID.

I.

THE DECISION BELOW IS CONTRARY TO AND IN CONFLICT WITH ALL THE PRIOR FEDERAL AND STATE COURT DECISIONS TOUCHING THE APPEALABLE CHARACTER OF A DECREE DIRECTING THE PARTIES TO PROCEED TO ARBITRATION.

No decision is cited in the opinion of the Circuit Court of Appeals, nor was any cited by counsel for respondents in the proceedings below, which holds that an order or decree directing the parties to proceed to arbitration is interlocutory and non-appealable. The pertinent decisions are all to the contrary. The Circuit Court of Appeals of the Second Circuit in *Krauss Bros. v. Bossart & Sons,* 62 Fed. (2d) 1004, reaching a conclusion directly contra to the Circuit Court of Appeals for the Ninth Circuit in the instant case, says:

> "We held in *Marchant v. Mead-Morrison Co.,* 29 F. (2d) 40, that such a suit could not be removed to a federal court after the arbitrators had been appointed and had made their award, because the proceeding is single until its conclusion. It does not follow that the order appointing arbitrators is not appealable under section 225 of title 28. **The purpose of arbitration is essentially an escape from judicial trial; the court takes a hand only so far as some sanction**

is necessary to compel the performance of the agreement to adopt the means provided. It is true that under section 9 of title 9 (U. S. C. A.), the successful party may enforce the award by judgment on which execution will go under section 13. But the judgment follows automatically unless the award has been vacated under section 10, and that is an independent application. **So far as the arbitration proceeding itself is concerned, the last deliberative action of the court is the appointment of arbitrators who thereupon take over the controversy and dispose of it.** Their disposition is not, properly speaking, reviewed by the court, in spite of possible disturbance under sections 10 and 11. **It seems to us, therefore, that the decree is final and appealable."**

In *Marchant v. Mead Mfg. Co.,* 252 N. Y. 284, 169 N. E. 386, Mr. Justice Cardozo of this Court, who was at that time Chief Justice of the New York Court of Appeals, says:

> **"An order for the specific performance of an agreement to arbitrate a controversy is one that finally determines a special proceeding. The proceeding thus ended is not a part of the arbitration that is thereby set in motion. It is subject to direct review as a separable controversy. Like any other final order, the mandate, unless void, is not assailable collaterally."**

In *Hosiery Mfg. Corp. v. Goldston,* 238 N. Y. 22, 143 N. E. 779, the Court at the very beginning of the opinion says:

> **"A motion is made to dismiss the appeal on the ground that the order appealed from is not a**

> **final order. An order to proceed to arbitration under an arbitration agreement is a final order."**

In the case of *In re Utility Oil Corp.*, 69 Fed. (2d) 524, the Circuit Court of Appeals of the Second Circuit considered on the merits an appeal from an order denying a petition to compel a party to proceed to arbitration; and the Circuit Court of Appeals for the Ninth Circuit admits in this case, that in *California Prune and Apricot Growers' Ass'n. v. Catz American Co.*, 60 Fed. (2d) 788, it entertained an appeal from an order of the District Court directing the submitting of a controversy to arbitration, and that

> **"the order on its face appeared to be a final order and was treated as such by the parties and by the court."**

We submit that the decision of the Circuit Court of Appeals in this cause is at variance with all prior decisions of State and Federal Courts.

II.

THE DECISION BELOW IGNORES THE WELL SETTLED AND UNIVERSAL PRINCIPLE OF GENERAL LAW THAT AN AGREEMENT TO ARBITRATE, WHICH ON ITS FACE ATTEMPTS TO OUST THE COURTS OF THEIR JURISDICTION, IS VOID.

The so-called arbitration agreement is void, invalid and unenforcible because it contains the provision that the decision of the German Consul shall be final,

> "both parties waiving recourse to the courts of law." (Apostles on Appeal, pages 45, 163.)

Parties will not be permitted, by agreement to submit to arbitration, to oust the jurisdiction of the Courts, whether the agreement relates to existing differences or to those which may arise in the future.

5 *Corpus Juris* 20.

That the so-called United States Arbitration Act (U. S. C. A., Tit. 9, Sec. 8) has no application to such a provision as the one under consideration, is apparent from the following language in *Re Thurston,* 48 Fed. (2d) 578:

> "By section 9 of the act the decree might be entered if the parties had stipulated in their policy for arbitration and that **judgment of the court should be entered upon the award made pursuant to the arbitration. But here the parties did not bring their dispute within either section 8 or section 9 of the Act. On the contrary, as above pointed out, they stipulated that the report of the umpire would be conclusive upon them. The other sections of the United States Arbitration Act are inapplicable here.**"

See also:

The Kensington, 183 U. S. 263, 46 L. Ed. 190;

Guarantee Trust & Safe Dep. Co. v. Green Cove etc. R. R. Co., 139 U. S. 137;

Potomac Steamboat Co. v. Baker Salvage Co., 123 U. S. 40.

The Circuit Court of Appeals by reason of its decree dismissing the appeal, has likewise refused to

consider the important question whether the so-called arbitration agreement could be binding upon the petitioner Hildegard Schoenamsgruber, who is a minor.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the foregoing important questions may be decided and finally determined by this Court, and that to such an end a writ of Certiorari should be granted; that this Court should review the decision of the Circuit Court of Appeals, **and upon such review hear and determine the entire cause**; and that, in any event, the decree of the Circuit Court of Appeals should be reversed, and the cause remanded with directions to the Court below to hear and determine the several appeals from the District Court on the merits.

Dated, San Francisco, California,
September 19, 1934.

HARRY H. SEMMES,
VINCENT W. HALLINAN,
EMMETT R. BURNS,
WILLIAM F. HERRON,
Proctors for Petitioners.

Due service and receipt of a copy of the within is hereby admitted

this.....day of September, 1934.

.....

.....

Proctors for Respondent.

8

FILE COPY

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1934

Nos. 424 and 425

HILDEGARD SCHOENAMSGRUBER, by Gustav Schoenamsgruber, her guardian,
Petitioner,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland", her engines, etc.,
Respondent,

and

GUSTAV SCHOENAMSGRUBER,
Petitioner,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland", her engines, etc.,
Respondent.

BRIEF FOR PETITIONERS.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

HARRY H. SEMMES,
Washington, D. C.,
VINCENT W. HALLINAN,
EMMETT R. BURNS,
WILLIAM F. HERRON,
369 Pine Street, San Francisco, California,
Proctors for Petitioners.

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Respondent.

BRIEF FOR PETITIONERS.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

REFERENCE TO THE OFFICIAL REPORT OF THE OPINIONS DELIVERED IN THE COURTS BELOW.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit in the causes entitled as above was rendered April 10, 1934, and is cited in the Federal Reporter, in 70 Fed. (2d) 234, and is set forth in full in the transcript of record (Apostles on Appeal) at page 162.

I. STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The date of the judgment of the United States Circuit Court of Appeals for the Ninth Circuit to be reviewed was April 10, 1934. (Apostles on Appeal, pages 168, 169.)

A petition for a rehearing was filed and the date of the denial thereof is the 11th of July, 1934. (Apostles on Appeal, pages 169, 170.)

II. THE SPECIFIC CLAIMS ADVANCED, AND THE RULINGS MADE, IN THE LOWER COURT, WHICH ARE RELIED UPON AS THE BASIS OF THIS COURT'S JURISDICTION, ARE AS FOLLOWS, TO-WIT:

(1) That the Honorable Circuit Court of Appeals in its opinion in this cause (70 Fed. (2d) 234) has committed error in holding in substance and effect that a decree or order of a District Court sitting in Admiralty directing the libelant and the libellees to proceed to arbitration and staying trial pending such arbitration (Apostles on Appeal, page 88) is an interlocutory and non-appealable order.

(2) That the said Honorable Circuit Court of Appeals has entered a decision herein in conflict with the decision of another Circuit Court of Appeals on the same matter, to-wit, the decision of the Circuit Court of Appeals for the Second Circuit in *Krauss Bros. v. Bossert & Sons,* 62 Fed. (2d) 1004, **"that the decree is final and appealable"**. (See Rule 38, Sec. 5, Subd. B of the Rules of the Supreme Court.) That in a previous decision in *California Prune and Apricot Growers' Ass'n. v. Catz American Co.,* 60 Fed. (2d) 788, the Circuit Court of Appeals for the Ninth Circuit, which rendered the decision sought to be reviewed, treated an order directing the submission of a controversy to arbitration as a final order and disposed of the question on the merits, though it did not directly pass upon the question of the appealability of the order.

(3) That the said Circuit Court of Appeals has decided an important question of general law in a way probably untenable, and in conflict with the weight of authority in this, to-wit: that the only cases cited in the opinion of the Circuit Court of Appeals involving the appealable character of an order directing the parties to proceed to arbitration, pronounce a rule opposite to the decision of the Circuit Court of Appeals in the instant case, and reach a contrary conclusion. (See Justice Cardozo's opinion in *Marchant v. Mead Mfg. Co.,* 252 N. Y. 284, 169 N. E. 386, and *Hosiery Mfg. Co. v. Goldston,* 238 N. Y. 22, 143 N. E. 779.)

(4) That the said Circuit Court of Appeals in the decision aforesaid, has decided an important question

of Federal law which has not been, but should be, settled by this Court; to-wit, whether a decree in admiralty directing the parties to proceed to arbitration is a final and appealable, or an interlocutory and non-appealable order.

(5) That the said Circuit Court of Appeals has so far departed from the accepted and usual course of judicial procedure and has so far sanctioned such a departure by a lower Court as to call for an exercise of this Court's power of supervision, to-wit, that said Circuit Court of Appeals by treating the order of the District Court as non-appealable, has sanctioned an order of the District Court, which, in effect, decrees the specific performance of a purported arbitration provision which is void on its face, because it shows on its face that it is an attempt to oust the Courts of their jurisdiction.

(6) That the said Circuit Court of Appeals erred in dismissing the appeal from the decree of the District Court directing the parties to proceed to arbitration, because the purported arbitration provision in the contract of carriage in the instant case is void, in that it shows on its face that it is an attempted ouster of the jurisdiction of the Courts. (See Arbitration Agreement as set forth in Opinion of Circuit Court of Appeals, Apostles on Appeal, page 163.)

(7) Any provision in a contract of a carrier, by land or sea, wherein the carrier exempts itself from liability for injuries is void and against public policy; the District Court erred in holding otherwise; and because of the void character of the agreement the Circuit Court of Appeals erred in dismissing the ap-

peals herein without hearing the same upon the merits.

(8) The provision in the contract of carriage for arbitration is likewise void because made on behalf of a minor, and a minor is not bound by a provision for arbitration made on his behalf.

(9) The provision for arbitration contained in the contract in question does not fall within the provisions of the so-called United States Arbitration Act. (9 U. S. C. A., Sec. 8; Apostles on Appeal, pages 28, 163.)

(10) That the cause of action as set forth in the articles of the libel herein, to-wit, a cause of action for rape on the high seas upon the libelant Hildegard Schoenamsgruber by a member of the crew of respondent vessel and an employee of the respondent corporation is not "a maritime transaction" as defined in Section I of Title 9 of the United States Code Annotated, and is not in anywise, manner or condition subject to arbitration as provided in the said arbitration agreement or otherwise; that any contract agreeing to submit a claim for damages for such offense to arbitration was, and is, illegal and void and contrary to public policy and good morals; and the District Court erred in holding otherwise, and the said Circuit Court of Appeals erred in dismissing the appeal from the said decree of said District Court. (Apostles on Appeal, page 85.)

III. THE STATUTORY PROVISIONS.

The statutory provision under which jurisdiction is invoked is Section 240 of the Judicial Code, 28 U. S. C. A., Sec. 347.

IV. A REFERENCE TO THE CASES BELIEVED TO SUSTAIN THE JURISDICTION.

These decisions are set forth in the petition for a writ of certiorari on file herein, pages 11-13, and for the sake of brevity the quotations therein set forth from the said cases are not here repeated. These decisions are:

Krauss Bros. v. Bossert & Sons, 62 Fed (2d) 1004 (by the Circuit Court of Appeals of the Second Circuit);

Marchant v. Mead Mfg. Co., 252 N. Y. 284, 169 N. E. 386 (opinion of Mr. Justice Cardozo);

Hosiery Mfg. Corp. v. Goldston, 238 N. Y. 22, 143 N. E. 777;

In re Utility Oil Corp., 69 Fed. (2d) 524;

California Prune and Apricot Growers' Ass'n. v. Katz American Co., 60 Fed. (2d) 788.

All of these decisions hold expressly or by implication that an order directing the parties to a suit to proceed to arbitration is a final order, and, in the language of Mr. Justice Cardozo, **"it is subject to direct review as a separable controversy"**.

A CONCISE STATEMENT OF THE CASE.

There could be no better or more concise statement of the case than the statement contained in the opinion of the Circuit Court of Appeals written in this cause by Judge Wilbur (Apostles on Appeal, page 162, 7 Fed. (2d) 234), which is as follows:

> "Two libels were filed in rem against the motorship 'Oakland', and in personam against the Hamburg American Line, a corporation, as owner of the motorship 'Oakland'. One of the libels was brought by Hildegard Schoenamsgruber, a minor, by Gustav Schoenamsgruber as her guardian ad litem, for $250,000 damages, and the other was brought by Gustav Schoenamsgruber on behalf of himself and his wife as the parents of said minor child for $50,000 damages. Both libels are based upon an alleged breach of a maritime contract for the carriage of the minor child, Hildegard Schoenamsgruber, from Hamburg, Germany, to San Francisco, California. The alleged breach consisted of the alleged misconduct of a certain chief cook aboard ship resulting in the infection of the six-year old daughter with a venereal disease.
>
> The libellees, in addition to denying the allegations of the libels, allege that the contract of transportation was entered into with the mother of the minor child and that it contained an agreement to arbitrate any complaints based upon a breach of the terms of the contract. The agreement was as follows:
>
> 'Complaints with respect to failure to fulfill this contract, claims for damages, etc., must be presented by the passenger immediately after arrival at the overseas port of destination to

the agent of the Hamburg American Line. In the event an agreement cannot be reached thereby, then the decision of the German Consul acting at the port of disembarkation **shall be final and his decision shall be accepted, both parties waiving recourse to the Courts at law.'**

The two libels were consolidated for trial, and on December 5, 1933, the trial Court made an order referring the controversy to the German Consul at San Francisco as arbitrator and directed that the proceeding be stayed pending the arbitration, and further provided:

'It is further ordered and decreed that this Court retain jurisdiction of the above entitled action to make such orders and enter such decrees as are required or contemplated by the United States arbitration law, or otherwise permitted or required by law.'

This order was evidently based upon 9 U. S. C. A., Sec. 8, which is as follows:

'Proceedings begun by libel in admiralty and seizure of vessel or property. If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure according to the usual course of admiralty proceedings, and the Court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.'

On the 14th day of December, notice of appeal from this order was given.

> The libellees moved for dismissal of the appeal on the ground that the order appealed from is not an appealable order because it is not final in the proceedings."

The Circuit Court of Appeals held that the order directing the parties to proceed to arbitration was a non-appealable, interlocutory order and entered a decree dismissing the appeal in each case. (Apostles on Appeal, pages 167, 168.)

SPECIFICATION OF SUCH OF THE ASSIGNED ERRORS AS ARE INTENDED TO BE URGED.

These specifications are heretofore stated in Subdivision C-2 of this brief, and for the sake of brevity are not restated.

V. THE ARGUMENT.

SUMMARY OF THE ARGUMENT.

I. THE DECISION OF TH CIRCUIT COURT OF APPEALS IS CONTRARY TO AND IN CONFLICT WITH ALL THE PRIOR FEDERAL AND STATE COURT DECISIONS TOUCHING THE APPEALABLE CHARACTER OF A DECREE DIRECTING THE PARTIES TO PROCEED TO ARBITRATE.

II. THE PURPORTED ARBITRATION PROVISION OF THE CONTRACT IS VOID BECAUSE IT SHOWS ON ITS FACE THAT IT IS AN ATTEMPTED OUSTER OF THE JURISDICTION OF THE COURTS.

III. THE SO-CALLED ARBITRATION AGREEMENT IS AGAINST PUBLIC POLICY AND VOID AS AN ATTEMPT BY THE

STEAMSHIP COMPANY, NOT ONLY TO SAVE ITSELF FROM TORTS COMMITTED BY ITS SERVANTS, BUT TO COMPOUND THEIR CRIMES. ANY PROVISION IN A CONTRACT OF A CARRIER, BY LAND OR SEA, WHEREIN THE CARRIER EXEMPTS ITSELF FROM LIABILITY FOR INJURIES IS VOID AND AGAINST PUBLIC POLICY.

IV. THE SO-CALLED ARBITRATION PROVISION, EVEN IF OTHERWISE VALID, IS NOT BINDING UPON HILDEGARD SCHOENAMSGRUBER, A MINOR.

I.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS CONTRARY TO AND IN CONFLICT WITH ALL THE PRIOR FEDERAL AND STATE COURT DECISIONS TOUCHING THE APPEALABLE CHARACTER OF A DECREE DIRECTING THE PARTIES TO PROCEED TO ARBITRATE.

No decision is cited in the opinion of the Circuit Court of Appeals, nor was any cited by counsel for respondents in the proceedings below, which holds that an order or decree directing the parties to proceed to arbitration is interlocutory and non-appealable. The pertinent decisions are all to the contrary. The Circuit Court of Appeals of the Second Circuit in *Krauss Bros. v. Bossert & Sons,* 62 Fed. (2d) 1004, reaching a conclusion directly contra to the Circuit Court of Appeals for the Ninth Circuit in the instant case, says:

> "We held in *Marchant v. Mead-Morrison Co.,* 29 F. (2d) 40, that such a suit could not be removed to a federal court after the arbitrators had been appointed and had made their award, because the proceeding is single until its conclu-

sion. It does not follow that the order appointing arbitrators is not appealable under section 225 of title 28. **The purpose of arbitration is essentially an escape from judicial trial; the court takes a hand only so far as some sanction is necessary to compel the performance of the agreement to adopt the means provided.** It is true that under section 9 of title 9 (U. S. C. A.), the successful party may enforce the award by judgment on which execution will go under section 13. But the judgment follows automatically unless the award has been vacated under section 10, and that is an independent application. **So far as the arbitration proceeding itself is concerned, the last deliberative action of the court is the appointment of arbitrators who thereupon take over the controversy and dispose of it.** Their disposition is not, properly speaking, reviewed by the court, in spite of possible disturbance under sections 10 and 11. **It seems to us, therefore,** that the decree is final and appealable."

In *Marchant v. Mead Mfg. Co.,* 252 N. Y. 284, 169 N. E. 386, Mr. Justice Cardozo of this Court, who was at that time Chief Justice of the New York Court of Appeals, says:

> **"An order for the specific performance of an agreement to arbitrate a controversy is one that finally determines a special proceeding. The proceeding thus ended is not a part of the arbitration that is thereby set in motion. It is subject to direct review as a separable controversy. Like any other final order, the mandate, unless void, is not assailable collaterally."**

In *Hosiery Mfg. Corp. v. Goldston,* 238 N. Y. 22, 143 N. E. 779, the Court at the very beginning of the opinion says:

> **"A motion is made to dismiss the appeal on the ground that the order appealed from is not a final order. An order to proceed to arbitration under an arbitration agreement is a final order."**

In the case of *In re Utility Oil Corp.*, 69 Fed. (2d) 524, the Circuit Court of Appeals of the Second Circuit considered on the merits an appeal from an order denying a petition to compel a party to proceed to arbitration; and the Circuit Court of Appeals for the Ninth Circuit admits in this case, that in *California Prune and Apricot Growers' Ass'n. v. Catz American Co.*, 60 Fed. (2d) 788, it entertained an appeal from an order of the District Court directing the submitting of a controversy to arbitration, and that

> **"the order on its face appeared to be a final order and was treated as such by the parties and by the court."**

None of the authorities cited in the opinion of the Circuit Court of Appeals in support of its conclusion are in point, as none of them related to arbitration agreements; the only cases involving arbitration cited in the opinion hold directly contra to the conclusion reached by the Circuit Court of Appeals.

France & Canada S. S. Co. v. French Republic, 285 Fed. 290, was an appeal from a decree dismissing cross libels in admiralty. The Circuit Court of Appeals for the Second Circuit, in an opinion written by Judge Rogers, dismissed the appeals without prejudice, citing as authority, among other cases, *Oneida Navigation Corporation v. W. & S. Job & Co.*, 252 U. S. 521, where it is said that "a case may not be brought here in fragments". We are well cog-

nizant of this rule and fully mindful of the soundness thereof. To permit litigants to appeal at every step in the litigation from every adverse ruling would sanction piecemeal litigation, and be productive of a multiplicity of suits. The rule is, therefore, that the cause must be finally disposed of. But in the case at bar, there has been a final disposition of the matter. **The District Court has abdicated its jurisdiction to hear and determine the cause.** It is no answer to say that the District Court has attempted to reserve jurisdiction to enter a final judgment or decree upon the award of the arbitrator, because the Court has no power "as a Court of admiralty to arbitrate, reform or modify the terms of the contract by ordering an arbitration elsewhere, or otherwise than as agreed upon by the parties."

The Silverbrook, 18 Fed. (2d) 144, 147.

Moreover, Section 7 of the contract in question contains the provision that all controversies shall be determined according to German law. (Apostles on Appeal, page 62.) Accordingly, this Court cannot say that the lower Court ordered the matter to arbitration pursuant to the provisions of the so-called *United States Arbitration Code.* The Federal Courts have repeatedly held that they will not enforce a foreign code of arbitration. In *The Beechwood,* 35 Fed. (2d) 41, the Court says:

> "A stipulation, in a marine instrument of the type of the documents under consideration, for arbitration in London comes within the words of section 2 of the statute (9 U. S. C. A. 2). To construe those words, however, so as to include

such a stipulation plainly would make section 2 inconsistent with or would nullify or would render inoperative sundry provisions of sections 4, 7, 9, 10, 11 and 12 (9 U. S. C. A. 4, 7, 9-12); possibly also certain parts of sections 5, 8 and 13 (9 U. S. C. A. 5, 8, 13). Under well-settled rules it is imperative therefore that the general words of section 2 be limited in application so as not to embrace arbitrations abroad (e. g., *Peck v. Jenness,* 7 How. 612, 623, 12 L. Ed. 841; *Meydenfeldt v. Daney Gold & Silver Mining Co.,* 93 U. S. 634; *U. S. v. Trans-Missouri Freight Association,* 166 U. S. 290, 320, 17 S. Ct. 540, 41 L. Ed. 1007).

The same conclusion was reached in The Silverbrook (D. C.), 18 F. (2d) 144, and *The Fredensbro* (D. C.), 18 F. (2d) 983.

As the statute does not validate the arbitration clauses involved here, the cases are governed by the law as established by the Supreme Court and summarized in *United States Asphalt R. Co. v. Trinidad Lake P. Co.* (D. C.) 222 F. 1006."

The Circuit Court of Appeals in the instant case has in effect granted a decree for the specific performance of an agreement to submit all matters in controversy to the consular agent of a foreign government, not bound by our law and not amenable to the process of our Courts, disqualified by reason of the fact that he represents the sovereignty which owns the libeled vessel. Such a decree is, of course, final in its nature and, therefore, appealable.

The case of *Cox v. Graves,* 55 Fed. (2d) 217, is likewise indecisive of any of the issues presented upon this appeal. The appeal in that case was in an action

at law where an equitable defense setting up fraud in the procurement of a contract was pleaded. The special plea was heard by the Court sitting in equity and an order was entered that the plea be rejected and that the cause be restored to the law docket that the legal issues involved might be tried before a jury. It was very properly held that the order was not appealable. The decision of Judge Wilbur in *Waialua Agr. Co. v. Christian,* 52 Fed. (2d) 847, is likewise not in point. In that case, a decision of the Supreme Court of Hawaii vacated the decree of the lower Court and remanded the cause with instructions to permit the amendment of the pleadings and to receive additional evidence. The decree did not purport on its face to be final and was not in its nature final. It contemplated further proceedings in the Circuit Court. We have no quarrel with this decision, but we respectfully submit that it is absolutely inapplicable to the situation in the case at bar.

In *Gardner v. Grand Beach Co.,* 29 Fed. (2d) 481, the decree appealed from adjudged that the rate of interest borne by certain bonds secured by a deed of trust was usurious under the law of Illinois and required the deduction from the principal of the bonds of all interest paid thereon. The Court expressly reserved certain matters for future determination prior to the entry of a decree of foreclosure, should the same be thereafter ordered. Obviously, this decree was not final in its nature and the appeal was very properly dismissed.

The Circuit Court of Appeals further cites the second edition of *O'Brien's Manual of Federal Appel-*

late Procedure. We have the very highest respect for the opinion of the learned author of this useful and convenient work, who is Clerk of the Circuit Court of Appeals for the Ninth Circuit, but the citations in Mr. O'Brien's text do not in any manner support the conclusion reached in the decision of the Court below. They merely pronounce the general rule that mere interlocutory orders are not appealable, and Mr. O'Brien's text cites no decisions arising in cases of enforced arbitration.

It is highly significant that the only arbitration cases referred to in the opinion of the Circuit Court of Appeals pronounce a rule opposite to that laid down in the opinion, and reach a contrary conclusion. The Circuit Court of Appeals attempts to repudiate its own decision in *California Prune and Apricot Growers Assn. v. Catz American Co.,* 60 Fed. (2d) 788, on the ground that the jurisdictional question was not raised, and that the Court, therefore, considered the appeal upon the merits. Of course, the question of jurisdiction, even though not raised or argued, was before the Court, and the presumption is that the Circuit Court of Appeals would not have considered an appeal from a non-appealable order. It is noteworthy that the contract in that case provided that "any disputes arising under this agreement to be settled by friendly arbitration", etc. The order of the lower Court was almost identical with the order in the case at bar, because it directed that the parties be summarily directed to proceed with arbitration. We frankly confess that we are at a loss to understand how the order in that case could be

regarded as final, and the order in the case at bar as interlocutory, merely.

We, therefore, respectfully submit that the decision of the Circuit Court of Appeals in this cause is at variance with all prior decisions of State and Federal Courts.

II.

THE PURPORTED ARBITRATION PROVISION OF THE CONTRACT IS VOID BECAUSE IT SHOWS ON ITS FACE THAT IT IS AN ATTEMPTED OUSTER OF THE JURISDICTION OF THE COURTS.

The alleged provision for arbitration is as follows:

> "Complaints with respect to failure to fulfill this contract, claims for damages, etc., must be presented by the passenger immediately after arrival at the overseas port of destination to the agent of the Hamburg-American Line. In the event an agreement cannot be reached thereby, then the decision of the German Consul acting at the port of disembarkation **shall be final and his decision shall be accepted, both parties waiving recourse to the courts at law.**" (Apostles on Appeal, page 45.)

It will be noted that the contract, upon its face, is a waiver of the right to resort to judicial proceedings. Such agreements have always been held void.

> "Parties will not be permitted, by agreement, to submit to arbitration, to oust the jurisdiction of the courts, whether the agreement relates to existing differences or to those which may arise in the future. In other words, the courts may disregard such agreements, assume jurisdiction and

> determine the matters in dispute which constitute the subject matters of the agreements, on the principle that the parties cannot deprive themselves of the right to resort to the proper legal tribunals for the submission of their controversies. The general principle that courts favor arbitration and will indulge every reasonable presumption to uphold arbitration proceedings is directly limited to proceedings which have resulted in an award, in consequence of which submission to arbitration cannot be specifically enforced and the parties to the submission may revoke it at any time before the award is made."
>
> 5 *Corpus Juris* 20.

It is an elementary rule that agreements whose object is to oust the jurisdiction of the Courts are contrary to public policy and will not be enforced.

In *Guaranty Trust and Safe Deposit Company v. Green Cove and Melrose Railroad Co.,* 139 U. S. 137, a suit was brought to foreclose a mortgage in the form of a deed of trust which contained a power of sale and which contained a further provision making the exercise of the power of sale the exclusive remedy of the mortgagee. The lower Court dismissed the foreclosure proceeding, and its judgment was reversed by the Supreme Court of the United States, holding:

> "It is true there is a subsequent provision in the deed of trust to the effect that neither the whole nor any part of the premises mortgaged shall be sold, under proceedings either at law or equity, for the recovery of the principal or interest of the bonds, it being the intention and agree-

ment of the parties that the mode of sale provided by the mortgage shall be exclusive of others. **This clause, however, is open to the objection of attempting to provide against a remedy in the ordinary course of judicial proceedings, and oust the jurisdiction of the courts, which, as is settled by the uniform current of authority, cannot be done.''**

The case of *Potomac Steamboat Co. v. Baker Salvage Co.,* 123 U. S. 40, is even more strongly in point. That was a libel *in rem* in a case of salvage. The libelee pleaded an arbitration agreement. The Supreme Court dismisses this contention in the following language:

> ''Nor can the agreement for arbitration affect the question of the salvage service. In the case of the Resby, 10 P. D. 114, there was an agreement to tow a ship in distress 'the matter of compensation to be left to arbitrators at home, to be appointed by the respective owners'. As to this, Sir James Hannan said: 'This, however, was valueless as an agreement. It could not have been pleaded as any answer to an action for salvage brought in the ordinary way in the admiralty division, and if effect could have been given to it at all, it would only have been by bringing an action upon it for not submitting to arbitration.' ''

The only answer to the general provisions of law contained in the foregoing decisions of the Supreme Court of the United States, is that the so-called United States Arbitration Act, which is here in question, provides, in substance and effect, that (Section 2, U. S. C. A., Title 9):

> "A written provision in any maritime transaction, or a contract evidencing a transaction involving commerce, to settle by arbitration, a controversy thereafter arising out of such contract or transaction, or the refusal to perform the same, or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, or refusal shall be valid, irrevocable and enforcible, save upon such grounds as exist at law and equity for the revocation of any contract."

It will be argued that under and by virtue of the provisions of the said act just quoted, the common law rules that inhibit contracts for the ouster of the jurisdiction of Courts have been abrogated by the statute. To this contention there are two answers: *First,* the statute itself in Sections 5-12 thereof clearly recognizes that an agreement to submit to an arbitrator, whose decision shall be final, is void, because it prescribes methods and modes of procedure to be taken and had before the arbitrator.

Second. It is obvious that under the provision of the statute which we just quoted, an agreement to submit to arbitration which would be revocable either at law or in equity, is invalid and will not be enforced.

The instant agreement because it attempts an ouster of the jurisdiction of the Courts over a matter properly cognizable on the admiralty side of the Court, must of necessity be null and void. That the agreement is revocable at the instance of the minor, we shall hereafter demonstrate.

Since the enactment of the arbitration act, it has been held in at least one well considered decision that such an agreement as the one in the case at bar is not, properly speaking, an agreement for arbitration at all. On the other hand, such an agreement is an agreement to forbear a suit or resort to judicial remedies and, therefore, under the well-known elementary principle of the common law is void.

In the case of *In re Thurston,* 48 Fed. (2d) 578, a decision of the Circuit Court of Appeals for the Second Circuit, it is clearly and distinctly held that an agreement, such as that in the case at bar, is not an arbitration agreement at all, and that an award made by an arbitrator selected thereunder cannot be confirmed by the Court. The essential facts in that case are as follows: A marine insurance policy covering the barge provided that in case of loss a survey should be made by surveyors—one appointed by each party—and if they failed to agree, an umpire might be appointed, pursuant to the United States Arbitration Act. An umpire was appointed by the Court. The order appealed from confirmed the report in its essential particulars. The clause of the policy provided for the appointment of the umpire read as follows:

> "If the surveyor appointed by these Insurers cannot agree with the surveyor appointed by the Assured upon an umpire, either party hereto may apply to the United States District Court for the district in which the home port of the vessel insured hereunder is located, for the appointment of an umpire pursuant to the United States Arbitration Act. The surveyors, or the umpire, if it shall become necessary to name one, shall make

specifications in writing, clearly stating both the amount of work and the manner in which it shall be done to make said vessel good in respect of any damage caused by the disaster. Such specifications shall be binding both upon the Assured and these Insurers as to the extent of damage and the manner in which the work shall be done, subject, nevertheless, to the policy terms and conditions and the question of whether or not the disaster and resulting loss or damage are covered by this policy."

In reversing the order confirming the report of the umpire, the Circuit Court of Appeals says of the parties to the contract:

"They did not stipulate for arbitration under this act. But the court confirmed by order a report which recited the appointment of the umpire, the fact that a survey was made of the barge and the repair specifications noted, and recommended the various repairs to be made. No judgment could be entered on this report. Under the United States Arbitration Act, provision is made for the entry of a decree upon the award 'if the basis of jurisdiction be a cause of action otherwise justiciable in admiralty', and 'the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings. By section 9 of the act the decree might be entered if the parties had stipulated in their policy for arbitration and that **judgment of the court should be entered upon the award made pursuant to the arbitration. But here the parties did not bring their dispute within either Section 8 or**

Section 9 of the Act. On the contrary, as above pointed out, they stipulated that the report of the umpire would be conclusive upon them. The other sections of the United States Arbitration Act are inapplicable here.

Since the policy does not substitute arbitration for a suit under it, but provides for a board to determine the facts as found here, which shall be conclusive upon the parties (citing cases), there was no jurisdiction in the court below to confirm this report.

The order will therefore be reversed, with directions to dismiss the petition for confirmation of the report."

The decision on the *Thurston* case is extremely apposite and is conclusive of the issues involved in the case at bar. It appears on the face of the so-called arbitration agreement, contained in Section 18 of the alleged contract between Mrs. Leischen Schoenamsgruber and the Hamburg American Line (Apostles on Appeal, page 45), that it is the intention of the parties not to submit the cause to arbitration and obtain an award thereon as provided in the United States Arbitration Act, but that any claim for damages which the passenger may have against the carrier shall be **immediately** submitted to the agents of the line at the port of disembarkation, and that in the event of a failure of the parties to agree, the decision of the German Consul shall be final and conclusive, **and that the parties waive all right to redress in the Courts of this country.** Such a provision, under the most elementary principles of law, and

particularly under the rules stated in the last cited case, is absolutely void.

The general rule is well stated by Judge Kerrigan in *Blodgett v. Bebe Co.,* 190 Cal. 665, 214 Pac. 38, 26 A. L. R. 1073:

> "It was early settled in the jurisprudence of this state, in conformity with that of practically all the states, that an agreement between parties to a contract to arbitrate all disputes thereafter to arise thereunder is invalid and unenforceable, as constituting an attempt to oust the legally constituted courts of their jurisdiction, and to set up private tribunals, but that if the matter to be submitted to the arbitrators was the mere finding of a fact, or facts, the determination of which is essential to the accrual of the cause of action itself, such arbitration or finding becomes a condition precedent to the right to sue, and is, therefore, not within the general rule. Judges and commentators have ascribed the origin of the rule to the jealousy of courts in the matter of their power and jurisdiction, and have been somewhat inclined to criticize it on that ground. **Another and better ground assigned for it is that citizens ought not to be permitted or encouraged to deprive themselves of the protection of the courts, by referring to the arbitrament of private persons or tribunals, in no way qualified by training or experience to pass upon them, questions affecting their legal rights.**"

III.

THE SO-CALLED ARBITRATION AGREEMENT IS AGAINST PUBLIC POLICY AND VOID AS AN ATTEMPT BY THE STEAMSHIP COMPANY NOT ONLY TO SAVE ITSELF FROM TORTS COMMITTED BY ITS SERVANTS, BUT TO COMPOUND THEIR CRIMES. ANY PROVISION IN A CONTRACT OF A CARRIER, BY LAND OR SEA, WHEREIN THE CARRIER EXEMPTS ITSELF FROM LIABILITY FOR INJURIES IS VOID AND AGAINST PUBLIC POLICY.

Passing from the fact that the so-called arbitration agreement is not an arbitration agreement at all and does not fall within the purview of the act under which the Honorable District Court assumed to make the direction contained in the order complained of, there is the broader and deeper consideration that the contract in question in so far as it attempts, if it does, to relieve the appellees—even to permit the claim to be arbitrated—of liability for a maritime tort such as the one here involved, is not only void under every statute of the United States and every State of the Union, but under the most fundamental and well recognized principles of international law. Contracts of this character have been uniformly held to be only unilateral in their character and not to be binding upon the passenger in the absence of a showing that the purchaser of a ticket knew or had his attention called to the provisions of the contract. In the case at bar, there is no such showing, and there could not well be, for the reason that the passenger in question was a female minor of the age of less than six (6) years, and presumably could not read. The ticket was not purchased in Germany, but was bought by the father of the infant for the conveyance of his wife and daughter from Hamburg, Germany, to San Fran-

cisco, California. An inspection of the photostatic copy of the ticket annexed to the affidavit of the learned proctor for the libellees, which we have heretofore referred to, will show that the terms and conditions relied upon by the libellees were printed in type so small that they cannot be read by anyone with ordinary eyesight without the aid of a magnifying glass. (See photostatic copy of ticket, Apostles on Appeal, pages 45 and 46.) The father, at the time that he contracted, knew nothing of its terms and conditions; the mother, at the time that the ticket was delivered to her and when she signed, if she did sign the agreement in question, did not know that there was any such provision in the terms of her passage. The Courts of this country have uniformly held that in transactions between a common carrier of persons and a passenger, the positions of the two parties are not relatively the same. The passenger cannot negotiate, he cannot haggle, as it were, with the carrier. In many places, at many railroad stations, and in many seaports, the only means of transportation furnished are those which are furnished by some one railroad or steamship line. The parties involved do not sit down together, they do not discuss pro and con the terms and conditions of the contract. The carrier may take the position of "take it or leave it". Accordingly, the Courts have uniformly held that such contracts are purely unilateral in their character, and will not be enforced in the absence of a showing that the passenger fully knew, appreciated, and understood, all of the terms of the contract. This rule has been stated, with his customary felicity, by Chief

Justice White, in the case of *The Kensington,* 46 Law. Ed. 190. In the statement of facts preceding the opinion of the Court, it is said:

> "There was no proof tending to show that at the time the ticket was issued the attention of Mrs. Bleecker or her daughter was called to the fact that it embodied exceptional stipulations relieving the company from liability, or that such conditions were agreed to, except in so far as a meeting of minds on the subject may be inferred from the fact of the delivery of the ticket by the company, and its acceptance, and that it contained on its face, in small but legible type, among others, the stipulations which are relied upon."

The learned Chief Justice says, in part:

> "It is settled in the courts of the United States that exemptions limiting carriers from responsibility for the negligence of themselves or their servants are both unjust and unreasonable, and will be deemed as wanting in the element of voluntary assent; and, besides, that such conditions are in conflict with public policy. This doctrine was announced so long ago, and has been so frequently reiterated, that it is elementary."

The statement made by Chief Justice White, as to the law, has been acquiesced in by the Courts for at least a century. The reason for the rule is that the carrier and the passenger do not stand upon the same footing. As stated by Judge Butler in *The Glenmavis,* 69 Fed. 472:

> "That the intent of the parties in this regard is thus expressed is, therefore, immaterial. In every instance where the courts have declared

such stipulations void, it has, of course, been against the express agreement of the parties. We have determined that such contracts are harmful and wrong; that they tend to encourage negligence, and justify oppression; that they affect injuriously not only the immediate parties, but the public at large; and that they are therefore unlawful."

In the leading case of the *New England,* 110 Fed. 415, it is held that where a passenger's trunk, which, when delivered by her to the steamship company, contained her wearing apparel, could not be found at the end of the voyage, and when afterwards forwarded to her was empty, and the company refused to give any explanation and when sued for the loss, introduced no evidence as to the care or treatment of the trunk while in its possession, a provision in the ticket issued by an English steamship company to a passenger in the United States for passage from an American to an English port that the contract shall be governed by the English law, was ineffectual to render valid a stipulation to exempt the company from liability which is contrary to the public policy of the United States.

In *Moses v. Hamburg American Packet Company,* 88 Fed. 329, it was held in a libel for collision in New York harbor causing loss of a hand of a boy four years old, a steerage passenger, that the steamer, being in fault, was not exempt by reason of a limitation expressed in the ticket to one hundred dollars for any personal injuries, this not being a reasonable provision.

The rule that the Courts will not uphold exemptions from liability contained in provisions printed upon tickets issued by railroad or steamship companies or other common carriers, is well stated by the Circuit Court of Appeals for the Second Circuit, in *Oceanic Steam Navigation Co. v. Corcoran,* 9 Fed. (2d) 724:

> "The courts of the United States recognize the fact that **the common carrier and his customer do not stand upon a footing of equality, and that the individual customer has no real freedom of choice.** He cannot afford to higgle or stand out. He prefers to accept any bill of lading the carrier tenders him, for in many cases he has no alternative; and it is against the policy of the law to allow a public carrier to abandon its obligations to the public by stipulating for exemptions which are unreasonable and which excuse it from negligence in the performance of its duty. That such contracts are illegal and void under any law is well settled. (Citing numerous cases.)"

If contracts by which a carrier attempts to exempt itself from liability for ordinary injuries to the person,—if contracts limiting the amount of damages to which the carrier shall be subject for the loss of baggage of the passenger are illegal and void because of their unreasonable and wholly unilateral character,—how, then, can it be said, under any principle of law, that an agreement which forces a female child under the age of six years,—outraged by a member of the crew of the vessel upon which her passage has been paid, to submit her claim to arbitration, can by any peradventure be valid? If such a rule be valid,

every woman passenger upon a vessel holds her chastity at the mercy of the crew; if she brings a suit for damages, she has no recourse to the Courts of the country in which she is disembarked. She must submit her claim to the Consul of the very nation whose flag is flown by the vessel upon which she was attacked.

Offenses of this character have always been regarded as the most flagrant under the maritime law. Under the law of this country, rape upon the high seas is punishable by death. (35 Stat. L. 1143.)

How, then, can such a crime be compounded by a compulsory arbitration, not signed by the party to be charged, particularly when the so-called arbitration agreement expressly states that neither party may resort to Courts of law, but must take the decision of a foreign non-judicial officer?

IV.

THE SO-CALLED ARBITRATION PROVISION, EVEN IF OTHERWISE VALID, IS NOT BINDING UPON HILDEGARD SCHOENAMSGRUBER, A MINOR.

At the time that the so-called arbitration agreement was executed, the petitioner Hildegard Schoenamsgruber was five (5) years of age. That an infant is incapable of entering into a valid contract for arbitration is too plain to admit of question, and it is likewise obvious that the right of the little girl to the security of her own person could not be bartered away by her parents.

It is scarcely necessary to cite authorities in support of the proposition that a minor, disqualified for the most part to make any contract, and always having the right of disaffirmance, saving, perhaps, in the case of a contract for the necessities of life, cannot be bound by an agreement to submit a controversy to arbitration. Thus in the case of an agreement to submit a will contest to arbitration, the Court says:

> "There are many other reasons why this submission cannot be sustained. **The principal beneficiary under the will, being a minor, was not bound by it.**"
>
> *Estate of Carpenter,* 127 Cal. 582, 585.

In *District of Columbia v. Bailey,* 171 U. S. 161, 43 L. Ed. 118, 124, the Court says:

> "The general rule is 'that everyone who is capable of making a disposition of his property, or a release of his right, may make a submission to an award; **but no one can, who is either under a natural or civil incapacity of contracting.**' "

In *Millsaps v. Estes,* 137 N. C. 535, 70 L. R. A. 170, it was held that an attempt to submit the cause of an infant to arbitration by parties acting on his behalf is absolutely void. On rehearing the Court in a very learned review of the authorities holds that the agreement is voidable. In a lengthy footnote to the decision (70 L. R. A. 170, et seq.), a large number of cases are cited which hold, with very few exceptions, that a parent, guardian or next friend has no power to submit an infant's interest to arbitration so as to bind the infant. Even if the arbitration provision in the instant case were only voidable, the situation

would not be changed, for the reason that the petitioner Hildegard Schoenamsgruber, by counsel, moved the District Court for a revocation of the arbitration agreement (Apostles on Appeal, pages 75, 76), which order was in effect denied by the order of the District Court on rehearing directing the parties to proceed to arbitration. (Apostles on Appeal, page 85.)

In the note to *Millsaps v. Estes,* supra, it is stated that as early as the reign of Henry VI the conclusion was reached that a plea of under-age at the time of a submission to arbitration for a trespass done by the infant is sufficient to invalidate the award.

And in *Britton v. Williams,* 6 Munf. 453, the Court says:

> "Although infants are bound by judgments had under the superintendence and protection of the Court, yet, where the case is referred to arbitrators, whereby they are deprived of that protection, a submission by infants, **even by rule of Court,** ought not to be sanctioned; for, as awards are in the nature of judgments and are to be final and conclusive, which cannot be where one party has the right to void them, it follows that a submission by infants, although with adults, cannot be obligatory on either party."

CONCLUSION.

It is respectfully submitted that the decree of the District Court directing the parties to proceed to arbitration is a final and appealable order, and the Circuit Court of Appeals committed error in dismissing the appeal from said decree. It is likewise sub-

mitted that the purported arbitration agreement is void as against public policy, is contrary to every principle of municipal law and the law of nations, and to the most fundamental concepts of morality and justice. And it is also respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed, and that this Court should in the exercise of its undoubted power, **dispose of the entire cause,** or, in any event, that the cause should be remanded to the Circuit Court of Appeals with directions to hear and determine the appeals from the District Court on the merits. As the order granting certiorari in this cause did not limit the consideration to any particular question, we have briefed the case on the merits as well as on the question of the appealability of the order of the District Court.

Dated, San Francisco, California,
November 19, 1934.

HARRY H. SEMMES,
VINCENT W. HALLINAN,
EMMETT R. BURNS,
WILLIAM F. HERRON,
Proctors for Petitioners.

Due service and receipt of a copy of the within is hereby admitted

this_____day of November, 1934.

_____

_____

_____

Proctors for Respondent.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1934

Nos. 424 and 425

HILDEGARD SCHOENAMSGRUBER, by Gustav Schoenamsgruber, her guardian,
Petitioner,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland", her engines, etc.,
Respondent,

and

GUSTAV SCHOENAMSGRUBER,
Petitioner,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland", her engines, etc.,
Respondent.

SUPPLEMENTAL BRIEF FOR PETITIONERS.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioners herein most respectfully ask leave to file this supplemental brief for the reason that since the filing of our opening brief a decision has been rendered by this Court, which, we submit, disposes of the main question here involved, favorably to the contentions of petitioners.

THE COURT BELOW (70 Fed. 2d 234) DISMISSED THE APPEAL OF PETITIONERS FROM AN ORDER OF THE DISTRICT COURT DIRECTING THE PARTIES TO PROCEED TO ARBITRATION AND STAYING TRIAL PENDING SUCH ARBITRATION (Apostles on Appeal, page 88) ON THE GROUND THAT THE ORDER IN QUESTION WAS AN INTERLOCUTORY ORDER AND HENCE NON-APPEALABLE.

This Honorable Court thereafter granted a writ of certiorari (79 Law. Ed. 113), the date of the order being October 22, 1934. In our opening brief, since the order granting the writ did not limit the consideration to any particular question or questions, we briefed the merits of the case, contending, among other things, that the arbitration agreement set forth by respondents in their answer, and on the basis of which the District Court ordered the parties to proceed to arbitration and stayed proceedings pending the same, (1) was void as an attempted ouster of the jurisdiction of the Courts, (2) was against public policy as an attempt by the carrier to exempt itself from liability for

torts and to compound the crimes committed by its servants against its passengers, and (3) that, in any event, it was not binding upon Hildegard Schoenamsgruber, a minor.

We further argued that the order directing the parties to proceed to arbitration and providing "that until such arbitration has been had and the award of the arbitrator filed herein, the trial of the action herein and further proceedings herein are hereby stayed", **was a final order and therefore appealable.**

(See *Apostles on Appeal,* page 85.)

This question is discussed in the opening brief for petitioners, pages 10-17.

Our opening brief was filed with the clerk of this Court November 24, 1934. The brief for respondents bears date of January 2, 1935.

THE DECISION OF THIS COURT IN SHANFEROKE COAL & SUPPLY CORP. v. WESTCHESTER SERVICE CORPORATION, ARGUED IN THIS COURT DECEMBER 7, 1934, AND DECIDED JANUARY 7, 1935 (79 Law. Ed. 269), HOLDS THAT AN ORDER GRANTING A STAY PENDING ARBITRATION IS AN APPEALABLE ORDER.

The opinion of Mr. Justice Brandeis in this last mentioned case, decided since the filing of all the briefs herein, holds specifically that an order such as the one in question is appealable, not as a final order in the cause, but as an order in the nature of a decree granting an injunction from which an appeal lies under Section 129 of the Judicial Code. (28 U. S. C. A. 227.)

Bearing in mind that the order appealed from in the present case granted a stay, and also that the arbitration agreement was pleaded in the answer of the respondents as a defense, the language of Justice Brandeis is, we submit, decisive of the question of the appealable character of the order in the case at bar:

> "The order of the District Court denying the stay was not a final judgment appealable under Section 128 of the Judicial Code, U. S. C. A. title 28, Section 225. Being an interlocutory order, it was appealable to the Circuit Court of Appeals under Section 129, only if the denial of the stay should be deemed the denial of an injunction. Compare *General Electric Co. v. Marvel Rare Metals Co.*, 287 U. S. 430, 432, 77 L. Ed. 408, 411, 53 S. Ct. 202. That question we must first determine although it was not raised below or by counsel here. See *Mansfield, C. & L. M. R. Co. v. Swan,* 111 U. S. 379, 382, 28 L. Ed. 462, 463, 4 S. Ct. 510. For the reasons stated in *Enelow v. New York L. Ins. Co.,* No. 47, decided this day (..... U. S. ....., ante, 247, 55 S. Ct. .....) *an order granting or denying a stay based on an equitable defense or cross-bill interposed in an action at law under Section 274b, U. S. C. A. title 28, Section 398, is appealable under Section 129. We are of the opinion that the special defense setting up the arbitration agreement is an equitable defense or cross-bill within the meaning of Section 274-b;* and that the motion for a stay is an application for an interlocutory injunction based on the special defense. Compare *Red Cross Line v. Atlantic Fruit Co.,* 264 U. S. 109, 121, 68 L. Ed. 582, 585, 44 S. Ct. 274. As bearing on this question of jurisdiction on appeal it is immaterial

> whether or not the terms of the contract sued on would preclude entry in a federal court of a decree for specific performance of the arbitration. Since the appeal here in question was taken within thirty days from the entry of the order denying the stay, the Court of Appeals had jurisdiction under Section 129."

Since this Court has held that an order **denying** a stay is equivalent to the denial of an injunction, it follows inevitably that **an order granting a stay should be deemed an order granting an injunction** within the meaning of Section 129.

CONCLUSION.

We therefore respectfully submit that the question as to the appealable character of the order has been set at rest by this Honorable Court, and that the judgment of the Circuit Court of Appeals should be reversed and the cause remanded with directions to the Honorable Court below to hear and determine the appeals herein on their merits.

Dated, San Francisco, California,
January 30, 1935.

HARRY H. SEMMES,
VINCENT W. HALLINAN,
EMMETT R. BURNS,
WILLIAM F. HERRON,
Proctors for Petitioners.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1934

No.

Office Supreme Court, U.
FILED
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CHARLES ELMORE CRO
CLERK

HILDEGARD SCHOENAMSGRUBER, by Gustav Schoenamsgruber, her guardian,

Petitioner,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland", her engines, etc.,

Respondent,

and

GUSTAV SCHOENAMSGRUBER,

Petitioner,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland", her engines, etc.,

Respondent.

424

425

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

J. HAMPTON HOGE,
California Commercial Union Building, San Francisco, California,
S. HASKET DERBY,
Merchants Exchange Building, San Francisco, California,
Proctors for Respondent.

DERBY, SHARP, QUINBY & TWEEDT,
Merchants Exchange Building, San Francisco, California,
Of Counsel.

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In the Supreme Court

OF THE

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OCTOBER TERM, 1934

No.

HILDEGARD SCHOENAMSGRUBER, by Gustav Schoenamsgruber, her guardian,

Petitioner,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland", her engines, etc.,

Respondent,

and

GUSTAV SCHOENAMSGRUBER,

Petitioner,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland", her engines, etc.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE.

A purely procedural point is all that is involved herein. The court below refused to discuss the merits of the appeal, but dismissed the appeal as premature. Any rights that petitioners wish to assert can be asserted after a final decree is entered herein.

Petitioners filed two libels in admiralty in the district court based on an alleged breach of contract to carry certain passengers safely from Germany to San Francisco. Said contract contained a clause requiring the parties to refer to arbitration any claims for damages or alleged breach of contract. Pursuant to the provision in said contract and pursuant to The United States Arbitration Act (9 U. S. Code, §8) the district court entered an order staying further proceedings before it and directing the parties to proceed to arbitration as required by their contract. The order of the district court expressly retained jurisdiction in the libel proceedings to enter a final decree in the case after the arbitrator should report his findings.

Petitioners refused to abide by said order and no hearing has been had before any arbitrator and no arbitration proceedings have been had. No final order nor decree has been made or entered by the district court, nor has any interlocutory decree determining the rights or liabilities of the parties been made or entered in the court below.

Notwithstanding, petitioners have appealed to the Circuit Court of Appeals for the Ninth Circuit, contending that the arbitration agreement in the contract sued upon was not binding upon the petitioners.

The Circuit Court of Appeals, however, refused to consider the merits of the question as to the enforceability of the arbitration agreement, deeming the appeal premature. It entered an order dismissing the appeal.

Petitioners here argue that the order of reference to the arbitrators was "final", and entitled them on appeal from the order to argue the merits of the validity of the arbitration agreement.

We reply by showing it to be the universal rule that an order is not final or appealable which refers a matter to a commissioner, master or referee, where the court making the reference retains jurisdiction to enter its own final decree or judgment. We state further, that while the question of the validity of the arbitration agreement is not before the court, the fact of such validity is well settled by the authorities.

APPEAL FROM AN ORDER OF REFERENCE IS PREMATURE; THE POINTS OF APPEAL SHOULD BE RAISED BY APPEAL FROM THE FINAL DECREE.

This court will dismiss an appeal where no final judgment has been entered. As stated in

> *Nyanza Steamship Co. v. Jahncke Drydock No. 1,* 264 U. S. 439, 440, 68 L. Ed. 777, 778:
>
> "The judgment must be not only in its nature final, but **a complete disposition of the cause** • • •. This rule is applicable to appeals in admiralty." (Emphasis by brief writers.)

No appeal may be had in admiralty except from a final order.

28 *U. S. Code,* §§225-227;

1 *Corpus Juris* 1345;

France & Canada S. S. Co. v. French Republic, 285 Fed. 290, 292-4;

1 *Benedict on Admiralty,* §533.

The order appealed from is not affected by the 1926 Act, 28 U. S. Code, §227, allowing appeals from certain interlocutory decrees "determining the rights and liabilities of the parties". That amendment covers only

> "an interlocutory decree in admiralty determining the rights and liabilities of the parties".

The order here involved is simply one of reference and makes no attempt to decree any rights or liabilities of the parties.

A final decision is one which determines "the rights or liabilities of the parties".

Cox v. Graves, 55 F. (2d) 217-218;

Gardner v. Grand Beach Co., 29 F. (2d) 481, 482.

The rule is stated in

1 *Corpus Juris* 1346,

as follows:

> "The rule for determining whether, for the purposes of an appeal, a decree is final, is, in brief, whether the decree disposes of the entire controversy between the parties. If it does not dispose of the whole case on its merits, it is not final".

The order directing the parties to proceed to arbitration does not determine any rights or liabilities of the

parties, but merely directs that those rights and liabilities be ascertained by arbitration.

As stated by Judge Wilbur in

Waialua Agr. Co. v. Christian, 52 F. (2d) 847,

the order

"is not final because it expressly directs further proceedings".

Where a case is referred to a commissioner to take testimony and report the order of the court

"cannot be regarded as final for the purposes of an appeal".

Deslions v. La Compagnie Generale Transatlantique, 210 U. S. 95, 52 L. Ed. 973.

Where an attempt is made to appeal from an order which is not final, the Circuit Court of Appeals is required to dismiss the appeal and leave the parties to protect their right by appeal from the final decree.

Arnold v. United States, 263 U. S. 427, 434, 68 L. Ed. 371;

Waialua Agr. Co. v. Christian (IX C. C. A. 1931), 52 F. (2d) 847;

Cox v. Graves, 55 F. (2d) 217-218;

France & Canada S. S. Co. v. French Republic, 285 Fed. 290, 292-4.

The Circuit Court of Appeals was required to dismiss the appeal as no judgment or decree could be entered in the original libel proceeding until after the arbitration be had; and an appeal from such judgment or decree can raise any objections to the validity of this arbitration agreement.

THE CASES CITED BY PETITIONERS DO NOT SUPPORT THEIR CONTENTION AS TO THE APPEALABILITY OF AN ORDER DIRECTING THE PARTIES TO PROCEED TO ARBITRATION.

In order to create an apparent conflict between the decision of the Circuit Court of Appeals for the ninth circuit holding that the order directing the parties to proceed to arbitration is not appealable, and other Circuit Courts of Appeal, petitioners state that the following cases are all to the contrary:

Krauss Bros. v. Bossert & Sons, 62 F. (2d) 1004;

California Prune & Apricot Growers Ass'n v. Catz American Co., 60 F. (2d) 788;

Marchant v. Mead Mfg. Co., 252 N. Y. 284, 169 N. E. 386;

Hosiery Mfg. Co. v. Goldston, 238 N. Y. 22, 143 N. E. 779.

Every one of these cases was relied upon by petitioners below, discussed in the briefs and fully considered by the court below.

A short comment on these cases will show that they do not support petitioners' contention.

The case of

Krauss Bros. v. Bossert & Sons, 62 F. (2d) 1004,

involves an appeal from a decree requiring arbitration. The opinion in the case does not set forth any authorities, but an examination of the record and briefs in the case shows the following facts, which were set forth by us in our brief to the court below and not contradicted by petitioners:

1. Both parties treated the order as final and apparently desired the appeal to be heard. The fact

that the court of its own initiative discussed the point indicates it doubted the appealability of the order.

2. No motion to dismiss the appeal was made.

3. No mention is made in any of the briefs as to whether or not the order was appealable.

4. No authorities on the question of the appealability of the order are referred to in any of the briefs, or even in the court's opinion.

5. That case was a special proceeding under section 4 of the Arbitration Act, whereas our case is an ordinary admiralty libel in which the request for an order for arbitration was made under section 8 of the Arbitration Act.

The decision in

Utility Oil Co., 69 F. (2d) 524,

was from an order *denying* arbitration. The opinion in that case does not discuss the finality or appealability of orders denying arbitration. Moreover, there is an important difference between granting and denying arbitration.

There is a plain analogy to rulings on demurrers. Where a general demurrer is sustained, there is a basis for appeal without a trial. Where the demurrer is overruled, the case must be tried before the ruling on the demurrer can be appealed. This distinction is suggested by the court in

The Maria, 67 F. (2d) 571,

holding non-appealable an interlocutory decree in admiralty overruling exceptions and denying a motion to dismiss the libel. The court says:

"It is clear that here not all of the 'merits' have yet been decided, by which we mean those issues on which liability, as distinguished from its amount, may depend finally.

"Whenever a demurrer is overruled, a successful appeal will terminate the suit, unless the pleading be amended.

"The reason for denying the appeal, when the case is in that posture, is that, if the decision prove to be right, a second appeal may be necessary."

* * * * * * *

" 'The rights and liabilities of the parties' are therefore fixed only on the hypothesis that the ruling was wrong, and that cannot be ascertained while the appeal is pending. Thus the question must be begged on which the existence of our jurisdiction turns".

The *Catz American* case was a decision in the 9th Circuit by the same court whose order is appealed from here. In its opinion below herein the court points out that in its earlier decision there was involved an appeal from an order directing arbitration under the State Act. The court points out that the state law provides for a special and summary proceeding to procure an order for arbitration and that an order under such a statute has been held to be final by the court of appeals of the State of New York in two New York cases, which are the ones above mentioned. The court below then distinguishes the two New York cases by pointing out that the order for arbitration here was "made in the course of litigation inaugurated by the libellant under the general law", and was not a special proceeding to procure an order for arbitration.

In the case of

Hosiery Mfg. Co. v. Goldston, 238 N. Y. 22, 143 N. E. 779,

Judge Pound is careful to point out that the New York Act makes the obtaining of an arbitration order "the end of one special proceeding". Being "the end" of a special proceeding under New York practice, it may well be deemed final, as it is the final order of the separate special proceeding which, as Judge Cardozo points out in the other case, is "not a part of the arbitration".

In the present case the order was not "the end" of any special proceeding, but only one of the steps toward the obtaining of a final judgment.

The case of

Marchant v. Mead Mfg. Co., 252 N. Y. 284, 169 N. E. 386,

is not an appeal from an order directing arbitration, but is an appeal from the judgment entered on the award of the arbitrators. That is precisely the remedy open in this case. Petitioners can appeal from the judgment when it is entered on the award of the arbitrators, if at that time they are so advised.

THE MERITS OF THE PROCEDURAL POINT.

The same logic which would permit an appeal from the interlocutory order in this case, would permit an appeal from every other step in the case. When a demurrer is overruled, counsel could with the same logic argue that an appeal might make unnecessary a trial of the facts; so likewise when a case is referred to a special master, or

a commissioner in admiralty, or when exceptions are overruled to a libel. As stated in petitioners' brief in the court below:

> "To permit litigant to appeal at every step in the litigation from every adverse ruling would sanction piecemeal litigation and be productive of a multiplicity of suits. The rule is therefore that the cause must be fully disposed of".

This case will not be "fully disposed of" until the trial court enters a judgment upon the arbitration award as contemplated by section 8 of The United States Arbitration Act.

Analogy may be made to decrees in admiralty referring cases to commissioners to take testimony (where, as here, such decrees are not affected by the 1926 Act, 28 U. S. Code, §227, allowing appeals from certain interlocutory decrees "determining the rights and liabilities of the parties"). Such a decree

> "cannot be regarded as final for the purposes of an appeal".
>
> *Deslions v. La Compagnie Generale Transatlantique,* 210 U. S. 95, 52 L. Ed. 973.

As stated in

1 *Corpus Juris* 1346, §297:

> "The rule for determining whether, for the purposes of an appeal, a decree is final, is, in brief, whether the decree disposes of the entire controversy between the parties. If it does not dispose of the whole case on its merits, it is not final".

THE ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE.

Petitioners' argument as to the invalidity of the arbitration clause is not relevant on this appeal, and on its merits is plainly answered by the express terms of the United States Arbitration Act.

Before the passage of The United States Arbitration Act in 1926, many courts refused to enforce arbitration agreements upon the alleged public policy that courts should not be ousted of their jurisdiction by the mere agreement of the parties.

Typical of such obsolete cases are those now cited by petitioners (without calling attention to the fact that policy purported to be expressed in those cases has since been reversed by Congress and the courts and condemned a "an anachronism").

These are:

Guaranty etc. Co. v. Green etc. Co., 139 U. S. 137, 35 L. Ed. 116;

Potomac etc. Co. v. Baker Salvage Co., 123 U. S. 40, 31 L. Ed. 75.

The first case was decided in 1890 (and has no reference to arbitration at all). The other was decided in 1887.

Decisions denying force to arbitration clauses as allegedly "ousting the jurisdiction of the courts" provoked quite a public outcry. Business organizations protested so vigorously that Congress made a special investigation resulting in The United States Arbitration Act of 1926, which repudiates the alleged public policy set out in these old cases cited by appellants.

This is discussed by the court in

The Silverbrook, 18 F. (2d) 144, 146,

which quoted that part of the Congressional report declaring

> "The need for the law arises from an anachronism of our American law".

As recently stated by Mr. Justice Martin in

> *In re Utility Oil Corp.*, 69 F. (2d) 524, 526:
>
> "The United States Arbitration Act * * * was intended * * * to change this view * * * It is quite apparent that Congress intended * * * to validate arbitration agreements as affirmative defenses in admiralty".

Even before the passage of the Arbitration Act, the United States Supreme Court stated in

> *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 68 L. Ed. 582, 585:
>
> "In admiralty also, agreements to submit controversies to arbitration are valid. Reference of maritime controversies to arbitration has long been common practice."

In that case was upheld the validity of the Arbitration Law of New York.

The validity of arbitration clauses (entered into since February 12, 1925) has been upheld under the Act by the United States Supreme Court in

> *Marine Transit Co. v. Dreyfuss*, 284 U. S. 263, 76 L. Ed. 282.

This is in accord with the public policy set out in the Act of 1925 (9 U. S. Code, §2), which provides that

> "A written provision in any maritime transaction or contract * * * to settle by arbitration a controversy * * * shall be valid, irrevocable and enforceable."

THE THURSTON CASE.

The only case cited under this heading by petitioners which was decided since the enactment of The United States Arbitration Act is

In re Thurston, 48 F. (2d) 578.

There was involved no arbitration agreement at all; no controversy was presented for decision. In that case an insurance policy provided for a surveyor, to specify what work was necessary to make a damaged vessel whole. The court very properly held the parties

> "did not stipulate for arbitration under this act • • • here the parties did not bring their dispute within either section 8 or section 9 of the act".

In our case section 8 is expressly applicable. For there is before the district court a pending libel in admiralty, and in the admiralty proceeding, a motion for arbitration was made. There is, therefore, applicable the plain terms of section 8 declaring that

> "If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, • • • the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award".

CONCLUSION.

All that the court below did was to hold that the appeal was premature. It did not pass upon the merits at all. The only issue involved was as to whether or not an appeal may be had before trial from a decree staying the proceedings and directing the parties to carry out the agreement to arbitrate. To permit an appeal in such an

instance would invalidate a whole host of cases holding that where an order refers matters to commissioners, referees or special masters and the like, the order is not final and cannot be appealed from until after the final decree is entered.

Under the circumstances, the United States Circuit Court of Appeals was required to dismiss the appeals before it and leave the parties free to protect their rights on appeal from the final order. This was the practice followed in the case of

Marine Transit Corp. v. Dreyfuss, 284 U. S. 263, 76 L. Ed. 282,

and is the practice which petitioners in this case should follow.

The order of reference in this case certainly cannot be deemed "a complete disposition of the cause" so as to constitute a "final" judgment from which an appeal may be had as said by this court in

Nyanza Steamship Co. v. Jahncke Drydock No. 1, 264 U. S. 439, 440, 68 L. Ed. 777, 778.

Petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
October 5, 1934.

Respectfully submitted,
J. HAMPTON HOGE,
S. HASKET DERBY,
Proctors for Respondent.

DERBY, SHARP, QUINBY & TWEEDT,
Of Counsel.

Due service and receipt of a copy of the within is hereby admitted

this.....day of October, 1934.

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Proctors for Petitioners.

In the Supreme Court

OF THE

United States

Office Supreme Court,
FILED
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CHARLES ELMORE CROPLEY

OCTOBER TERM, 1934

Nos. 424 and 425

HILDEGARD SCHOENAMSGRUBER, by Gustav Schoenamsgruber, her guardian,

Petitioner,

vs.

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Respondent,

and

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vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland", her engines, etc.,

Respondent.

BRIEF FOR RESPONDENT
(After Petition for Writ of Certiorari Granted).

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Petitioners filed libels in admiralty for breach of contract to carry passengers on respondent vessel. The trial court, in accordance with section 8 of the United States Arbitration Act, stayed proceedings and referred the cases to an arbitrator as provided for in the contracts sued upon. Petitioners thereupon appealed to the Circuit Court of Appeals.

That court dismissed the appeal as premature, no "final" decree on the merits having been obtained below. Petition for writ of certiorari to the Circuit Court of Appeals was granted.

Thus the issue on appeal is whether an order under the Arbitration Act referring a case to an arbitrator is final and appealable. Other issues in addition are discussed by the petitioners in respect to the enforceability of the arbitration clause in the contract, and while irrelevant on this appeal are nevertheless answered by respondents.

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In the Supreme Court
OF THE
United States

October Term, 1934

Nos. 424 and 425

Hildegard Schoenamsgruber, by Gustav Schoenamsgruber, her guardian,

Petitioner,

vs.

The Hamburg American Line (a corporation), Claimant of the Motorship "The Oakland", her engines, etc.,

Respondent,

and

Gustav Schoenamsgruber,

Petitioner,

vs.

The Hamburg American Line (a corporation), Claimant of the Motorship "The Oakland", her engines, etc.,

Respondent.

BRIEF FOR RESPONDENT
(After Petition for Writ of Certiorari Granted).

STATEMENT OF THE CASE.

All that was done by the court below in this case was to dismiss the appeal as premature on the ground that the order appealed from was not final, but interlocutory and as such not appealable. Therefore, the principal issue on this appeal is whether or not an order made in an admiralty proceeding under section 8 of the United States Arbitration Act is a final order and hence appealable, or merely interlocutory and therefore not appealable.

The orders appealed from were made by the District Court in two admiralty proceedings brought for alleged breach of a maritime contract to carry certain passengers from Germany to this country on board the respondent vessel. The contract relied upon provided for arbitration, and respondents in reliance upon the United States Arbitration Act, particularly section 8 thereof applying to admiralty proceedings, moved the trial court to direct the parties to proceed to arbitration, and in the meanwhile to stay the trial until such arbitration be had as agreed to by the parties to the contract.

The petitioners refused to proceed to arbitrate, and no proceedings before the arbitrator have been had. Instead, the petitioners took an appeal to the Circuit Court of Appeals for the Ninth Circuit. That court refused to entertain the appeal, branding it as "premature" and declaring the orders appealed from to be merely interlocutory and not final.

As the petition for certiorari was directed against the order of the Circuit Court of Appeals, and as that court refused to discuss the merits or the validity of the order

referring the case to the arbitrator, we take it that all that is involved on this appeal is the propriety of the action of the Circuit Court of Appeals and that there is not before this court most of the matters argued by the petitioners, namely, those having to do with the enforcibility of the arbitration clause.

However, we feel compelled to answer the points raised in the briefs and comment on them briefly, although we believe that the petition for certiorari was not granted to consider anything but the action of the court below.

On the procedural point involved we shall argue that the orders referring the cases to the arbitrator on their face show them to be interlocutory and not final, and that the Act under which they were made shows that Congress considered the order directing reference to the arbitrator merely preliminary to the entry of a final decree by the District Court itself.

This court has never passed upon the finality or appealability of such an order as the only case under the Act reaching this court was an appeal from a decree made after arbitration was had, and not from the order directing arbitration. However, we shall refer to many decisions by this court holding decrees not appealable until after there has been a complete disposition of the controversy in the trial court on the merits, and expressly holding non-appealable such analogous orders as those which direct a reference to commissioners, masters, referees, auditors and the like.

I. THE ORDER DIRECTING ARBITRATION WAS NOT A "FINAL" ORDER AND THE CIRCUIT COURT OF APPEALS PROPERLY DISMISSED THE APPEAL THEREFROM AS PREMATURE.

It is settled by statutes and decisions that the Circuit Court of Appeals has no jurisdiction unless the order or judgment appealed from be "final"*.

28 *U. S. Code* §§225, 227, 344;

1 *Corpus Juris,* 1345;

1 *Benedict on Admiralty* (5th ed.) §533;

France etc. Co. v. French Republic, 285 Fed. 290, 292-4;

Oneida Navigation Corp. v. W. & S. Job Co., 252 U. S. 521, 64 L. Ed. 697.

In the case last cited this court said

> "a case may not be brought here in fragments. This court has jurisdiction * * * only from judgments which are both final and complete. * * *
>
> The case was not ripe for appeal. Although the objection was not raised by the appellee, the appeal is dismissed for want of jurisdiction."

Petitioners do not dispute this rule, graphically declaring that

> "to permit litigants to appeal from every adverse ruling would sanction piecemeal litigation, and be productive of a multiplicity of suits. The rule is, therefore, that the cause must be fully disposed of."

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*NOTE: The order appealed from is not affected by the 1926 Act, 28 U. S. Code §227, allowing appeals from certain interlocutory decrees, "determining the rights and liabilities of the parties". That amendment covers only "an interlocutory decree in admiralty determining the rights and liabilities of the parties".
The order here involved is simply one of reference and makes no attempt to decree any rights or liabilities of the parties.

Petitioners then go on to argue that the order appealed from is final.** That is the real question before the court,—namely whether an order rendered by a District Court under §8 of the Arbitration Act is appealable or not. This court has never passed upon the identical question but it has passed upon the appealability of orders involving references to commissioners and the like. The only case*** discussing the "United States Arbitration Act" which has reached this court is

Marine Transit Co. v. Dreyfuss, 284 U. S. 263, 76 L. Ed. 282.

In that case no appeal was taken until after the arbitration was had and a final decree entered. That is the practice we contended should have been followed in the case at bar.

**NOTE: Petitioner's brief (p. 13) intimates that the order referring the case to arbitration was based on German law rather than on the United States Arbitration Act. However, the written notice of motion pursuant to which the order was made expressly states the motion to be based on the "United States Arbitration Act" and does not refer to German law. In fact the orders appealed from themselves (Trans. pp. 88 and 89) expressly recite that the arbitration is to be conducted subject to the "United States Arbitration Act". (For reasons best known to themselves, petitioners have omitted this notice of motion from the printed record.) The *Beechwood* case (35 F. (2d) 41) cited by petitioners was a New York District Court decision that has since been overruled by the Circuit Court of Appeals for the Second Circuit. *Shanferoke v. Westchester S. Corp.*, 70 F. (2d) 297, 298. Furthermore, it involved an arbitration in London, beyond the court's jurisdiction. The order in the case at bar involves arbitration in San Francisco within and under the court's jurisdiction.

***Only three other cases involving the United States Arbitration Act are mentioned in Shepard's Citations as having reached this court. In all three, petitions for certiorari were denied.

Lehigh Structural Steel Co. v. Rust Engineering Co., 287 U. S. 626; 77 L. Ed. 543;

Munson Steamship Line v. North of England Steamship Co., Ltd., 288 U. S. 601; 77 L. Ed. 977;

Petroleum Navigation Co. v. Utility Oil Corp., 292 U. S. 655; 78 L. Ed. 1504.

In the first two cases the award had already been made.

In re North of England S. S. Co., 57 F. (2d) 672;

Lehigh Structural Steel Co. v. Rust Engineering Co., 59 F. (2d) 1038.

The third case involved an order *denying* arbitration.

In re Utility Oil Corporation, 69 F. (2d) 524.

This third case is discussed herein at page 22.

We shall discuss the present case under the following headings:

a. The order appealed from shows on its face that it is not final as the court expressly reserves the right to make further orders and decisions, expressly referring to the subsequent entry of a decree as contemplated by §8 of the Act.

b. The Act itself shows that the order is not the final step in the proceeding, as the entry of a final decree is expressly provided for and power given the District Court to vacate, confirm, modify or correct the award of the arbitrator.

c. As a general rule, no decree is "final" unless it disposes of the rights and liabilities of the parties and disposes of the entire controversy between the parties, leaving no further judicial acts to be performed.

d. In analogous situations, involving orders referring cases to commissioners, referees, etc., this court has held the orders of reference not final.

e. The cases cited by petitioner.

f. The practical consequences involved.

a. THE ORDER APPEALED FROM SHOWS ON ITS FACE THAT IT IS NOT FINAL AS THE COURT EXPRESSLY RESERVES THE RIGHT TO MAKE FURTHER ORDERS AND DECISIONS, EXPRESSLY REFERRING TO THE SUBSEQUENT ENTRY OF A DECREE AS CONTEMPLATED BY §8 OF THE ACT.

The orders appealed from recited (Trans. pp. 85, 88):

"It is hereby ordered and decreed that the entire controversy set out in the libel herein be and the same is hereby submitted to arbitration before E.

Baron von Berchen, German Consul at San Francisco, as arbitrator, and the parties hereto are hereby directed to proceed to arbitrate said controversy before said arbitrator. Said arbitrator may withdraw from the Court for his use in the arbitration proceedings before him, all pleadings, depositions and other papers on file herein, to be returned to this Court with his award herein, unless said pleadings, depositions or other papers are sooner ordered returned by this Court and said pleadings, depositions, and other papers to be at all times subject to the further orders of the Court.

It is further ordered and decreed that until such arbitration has been had and the award of the arbitrator filed herein, the trial of the action herein and further proceedings herein are hereby stayed.

It is further ordered and decreed that this Court retain jurisdiction of the above entitled action to make such orders and enter such decrees as are required or contemplated by 'The United States Arbitration Act' or otherwise permitted or required by law and

It is further ordered and decreed that the arbitration before said arbitrator shall be conducted as required by said act and subject to such rules of law as may be applicable."

It is to be noted that by its terms the order is not final but contemplates a continuing supervision over the proceedings. This "supervision" has been recently commented on by Judge Learned Hand in

Shanferoke v. Westchester S. Corp., 70 F. (2d) 297, 298.

The court expressly orders that it "retains jurisdiction" to make such orders in the premises as are required or permitted by law, expressly mentioning "decrees required or contemplated by "The United States Arbitration Act". The orders expressly contemplate that the proceedings be kept open for the filing of the award and for such action thereon as is required by law. By the terms of the order various pleadings, depositions and other papers are "at all times subject to further orders of the court".

Furthermore, it must be noted that this order was made not in a special proceeding to that end, and terminating with the making of this order, but in the course of an admiralty proceeding filed by the petitioners themselves. Those admiralty proceedings are still pending as the orders appealed from require that until arbitration has been had and the award filed

> "the action herein and further proceedings herein are hereby stayed."

A stay of proceedings is not a termination of the proceedings, but implies they are still pending awaiting further action from the court.

b. THE ACT ITSELF SHOWS THAT THE ORDER IS NOT THE FINAL STEP IN THE PROCEEDING, AS THE ENTRY OF A FINAL DECREE IS EXPRESSLY PROVIDED FOR AND POWER GIVEN THE DISTRICT COURT TO VACATE, CONFIRM, MODIFY OR CORRECT THE AWARD OF THE ARBITRATOR.

Section 3 of the Act (9 U. S. Code §3) states that if a suit or proceeding is pending in any court of the United States the court may stay the trial of the action until any arbitration agreement between the parties is observed.

As considered by Judged Learned Hand in

Shanferoke etc. Co. v. Westchester S. Corp., 70 F. (2d) 297, 299,

a "stay" may involve some supervision over the arbitration and such superintendency is not beyond the powers of the court.

Furthermore, section 8 expressly covers the case at bar as that section refers to admiralty causes of action and provides that if the basis of jurisdiction be an admiralty cause of action the court may direct the parties to proceed with the arbitration,

> "and shall retain jurisdiction to enter its decree upon the award."

This retention of jurisdiction is not for the merely ministerial purpose of entering a formal decree. By §10 of the Act a number of circumstances are set out entitling the court to vacate the award and if within time, to direct a re-hearing of the arbitration. By §11 of the Act the court is given power in described situations to modify and correct the award to effect the intent thereof and promote justice between the parties. Provisions are also set out in §§9, 12 and 13, for motions to the court to confirm, vacate, modify or correct the award.

A reading of the Act thus demonstrates that orders directing arbitration are merely interlocutory orders setting into force various proceedings intended to culminate in a final decree, the Act expressly requiring the court to "retain jurisdiction to enter its decree upon the award".

c. **AS A GENERAL RULE, NO DECREE IS "FINAL" UNLESS IT DISPOSES OF THE RIGHTS AND LIABILITIES OF THE PARTIES AND DISPOSES OF THE ENTIRE CONTROVERSY BETWEEN THE PARTIES, ON THE MERITS, LEAVING NO FURTHER JUDICIAL ACTS TO BE PERFORMED.**

The general rule is stated in

1 *Corpus Juris,* 1346,

as follows:

> "The rule for determining whether, for the purposes of an appeal, a decree is final, is, in brief, whether the decree disposes of the entire controversy between the parties. If it does not dispose of the whole case on its merits, it is not final."

In

Bostwick v. Brinkerhoff (106 U. S.), 16 Otto, 3, 4; 27 L. Ed. 73, 74,

the court says:

> "The rule is well settled and of long standing, that a judgment or decree, to be final, within the meaning of that term as used in the Acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered. * * * **If the judgment is not one which disposes of the whole case on its merits, it is not final.** Consequently, it has been uniformly held that a judgment of reversal, with leave for further proceedings in the court below, cannot be brought here on writ of error."

The order directing the parties to proceed to arbitration does not determine any rights or liabilities of the parties,

but merely directs that those rights and liabilities be ascertained by arbitration.

A final decision is one which determines "the rights or liabilities of the parties".

Cox v. Graves, 55 F. (2d) 217-218;
Gardner v. Grand Beach Co., 29 F. (2d) 481, 482;
Waialua Agr. Co. v. Christian, 52 F. (2d) 847.

In

Arnold v. United States, 263 U. S. 427, 434; 68 L. Ed. 371, 375, the court said:

"It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must be not only final, but complete, that is, final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction. Hohorst v. Packet Co., 148 U. S. 262, 264, 134 S. Ct. 590, 37 L. Ed. 443; Collins v. Miller, 252 U. S. 364, 370, 40 S. Ct. 347, 64 L. Ed. 616; Oneida Navigation Corporation v. Job, 252 U. S. 521, 522, 40 S. Ct. 357, 64 L. Ed. 697; and cases there cited."

Where an accounting remains to be had, the decree is not final:

Keystone etc. Co. v. Martin, 132 U. S. 91, 93, 33 L. Ed. 275, 276.

Where the decree orders a reference to a master, there is no settlement of the "entire controversy". This court has said that

"Plainly such a decree is not appealable. If it were, the case could be taken to the Appellate Court by successive appeals. But this the law wisely prevents by postponing the right of appeal until there is a final decree disposing of this whole case."

Rexford v. Brunswick etc. Co., 228 U. S. 339, 346, 57 L. Ed. 864, 867.

The rule requires that

"The judgment, to be appealable, should be final not only as to all the parties, but as to the whole subject matter and as to all the causes of action involved."

Collins v. Miller, 252 U. S. 364, 370, 64 L. Ed. 616, 619.

An early case declares that

"It has been the object of this court at all times to restrict appeals to those in which the rights of the parties have been fully and finally determined • • • whether they were cases in admiralty, in equity or common law."

Beebe v. Russell (60 U. S.), 19 How. 283, 15 L. Ed. 668.

d. IN ANALOGOUS SITUATION, INVOLVING ORDERS REFERRING CASES TO COMMISSIONERS, REFEREES, ETC., THIS COURT HAS HELD THE ORDERS OF REFERENCE NOT FINAL.

Where a case is referred to a commissioner to take testimony and report, the order of reference

"cannot be regarded as final for the purposes of an appeal."

Deslions v. La Compagnie Generale Transatlantique, 210 U. S. 95, 52 L. Ed. 973.

It is settled that, where a decree fixes the rights of the parties but refers the case to a master or commissioner, the decree is not final. In the case of

California National Bank v. Stateler, 171 U. S. 447; 43 L. Ed. 233, 234,

the court says:

> "The settled rule is that if a superior court makes a decree fixing the liability and rights of the parties, and refers the case to a master or subordinate court for a judicial purpose, such, for instance, as a statement of account upon which a further decree is to be entered, the decree is not final." (Citing numerous Supreme Court cases.)

An order referring cases to a master has been held not final and not appealable.

Rexford v. Brunswick etc. Co., 228 U. S. 339, 57 L. Ed. 864, 867;

Latta v. Kilbourn, 150 U. S. 524, 540, 37 L. Ed. 1169, 1175;

Dodge v. Patten, 43 F. (2d) 472, 473 (citing many cases);

Barnard v. Gibson (48 U. S.), 7 How. 650, 12 L. Ed. 857;

Steel & Tube Co. v. Dingess, 3 F. (2d) 805. (Citing many cases.)

The authorities are reviewed by Mr. Justice Brown in

McGourkey v. Toledo & O. C. R. Co., 146 U. S. 536, 545, 36 L. Ed. 1079, 1083,

where the court said:

> "If the court make a decree fixing the rights and liabilities of the parties, and thereupon refer the case to a master for a ministerial purpose only, and

no further proceedings in court are contemplated, the decree is final; **but if it refer the case to him as a subordinate court and for a judicial purpose, as to state an account between the parties, upon which a further decree is to be entered, the decree is not final.''**

A reference to a master involving judicial functions has been held not to be final.

Beebe v. Russell (60 U. S.), 19 How. 283; 15 L. Ed. 668 (reference to master to take an account of rents);

Humiston v. Stainthorp (69 U. S.), 2 Wall. 106; 17 L. Ed. 905 (reference to take accounts);

Keystone Manganese & Iron Co. v. Martin, 132 U. S. 91; 33 L. Ed. 275 (decree granting injunction and appointing master to take accounts);

Lodge v. Twell, 135 U. S. 232; 34 L. Ed. 153 (decree appointing receiver to sell property.

A decree requiring an accounting has been held not to be final although it grants an injunction on the merits.

Keystone etc. v. Martin, 132 U. S. 93; 33 L. Ed. 275, 276.

An order reversing a lower court and remanding the case for further proceedings has been held not final.

Haseltine v. Central Bank, 183 U. S. 130, 46 L. Ed. 117;

Union Mutual Life Ins. Co. v. Kirchoff, 160 U. S. 374, 40 L. Ed. 461.

c. THE CASES CITED BY PETITIONER.

In order to create an apparent conflict between the decision of the Circuit Court of Appeals for the Ninth Circuit

holding that the order directing the parties to proceed to arbitration is not appealable, and other Circuit Courts of Appeals, petitioners state that the following cases are all to the contrary:

In re Utility Oil Co., 69 F. (2d) 524;

Krauss Bros. v. Bossert & Sons, 62 F. (2d) 1004;

California Prune & Apricot Growers Ass'n v. Catz American Co., 60 F. (2d) 788;

Marchant v. Mead Mfg. Co., 252 N. Y. 284, 169 N. E. 386;

Hosiery Mfg. Co. v. Goldston, 238 N. Y. 22, 143 N. E. 779.

Every one of these cases was relied upon by petitioners below, discussed in the briefs and fully considered by the court below. A short comment on these cases will show that they do not support petitioners' contention. We shall discuss first the New York cases, and then the federal cases.

The New York Cases.

In the case of

Hosiery Mfg. Co. v. Goldston, 238 N. Y. 22, 143 N. E. 779,

Judge Pound is careful to point out that the New York Act makes the obtaining of an arbitration order "the end of one special proceeding". Being "the end" of a special proceeding under New York practice, it may well be deemed final, as it is the final order of the separate special proceeding which, as Judge Cardozo points out in the other case, is "not a part of the arbitration".

In the present case the order was not "the end" of any special proceeding, but only one of the steps toward the

obtaining of a final judgment in an admiralty proceeding still pending.

The case of

Marchant v. Mead Mfg. Co., 252 N. Y. 284, 169 N. E. 386,

is not an appeal from an order directing arbitration, but is an appeal from the judgment entered on the award of the arbitrators. That is precisely the remedy open in this case. Petitioners can appeal from the judgment when it is entered on the award of the arbitrators, if at that time they are so advised.

The language attributed Mr. Justice Cardozo in the *Marchant* case omits his citation to the *Goldston* opinion by Judge Pound. Having the omitted citation in mind it is obvious that the court considers that an order directing arbitration terminates a "special proceeding" under the New York Act and therefore is final. But an order made in the course of a pending admiralty proceeding does not end the admiralty case; on the contrary jurisdiction under the act is especially retained for a number of purposes.

The Federal Cases.

The case of

Krauss Bros. v. Bossert & Sons, 62 F. (2d) 1004,

involves an appeal from a decree requiring arbitration. The opinion in the case does not set forth any authorities, but an examination of the record and briefs in the case shows the following facts, which were set forth by us in our brief to the court below and not contradicted by petitioners:

1. Both parties treated the order as final and apparently desired the appeal to be heard. The fact that

the court of its own initiative discussed the point indicates it doubted the appealability of the order.

2. No motion to dismiss the appeal was made.

3. No mention is made in any of the briefs as to whether or not the order was appealable.

4. No authorities on the question of the appealability of the order are referred to in any of the briefs, or even in the court's opinion.

5. That case was a special proceeding under section 4 of the Arbitration Act, whereas our case is an ordinary admiralty libel in which the request for an order for arbitration was made under section 8 of the Arbitration Act.

The decision in

Utility Oil Co., 69 F. (2d) 524,

was from an order *denying* arbitration. The opinion in that case does not discuss the finality or appealability of orders denying arbitration. Moreover, there is an important difference between granting and denying arbitration.

There is a plain analogy to rulings on demurrers. Where a general demurrer is sustained, there is a basis for appeal without a trial. Where the demurrer is overruled, the case must be tried before the ruling on the demurrer can be appealed. This distinction is suggested by the court in

The Maria, 67 F. (2d) 571,

holding non-appealable an interlocutory decree in admiralty overruling exceptions and denying a motion to dismiss the libel. The court says:

"It is clear that here not all of the 'merits' have yet been decided, by which we mean those issues on

which liability, as distinguished from its amount, may depend finally.

Whenever a demurrer is overruled, a successful appeal will terminate the suit, unless the pleading be amended.

The reason for denying the appeal, when the case is in that posture, is that, if the decision prove to be right, a second appeal may be necessary."

* * * * * * *

" 'The rights and liabilities of the parties' are therefore fixed only on the hypothesis that the ruling was wrong, and that cannot be ascertained while the appeal is pending. Thus the question must be begged on which the existence of our jurisdiction turns."

The *Catz American* case was a decision in the Ninth Circuit by the same court whose order is appealed from here. In its opinion below herein the court points out that in its earlier decision there was involved an appeal from an order directing arbitration under the state act. The court points out that the state law provides for a special and summary proceeding to procure an order for arbitration and that an order under such a statute has been held to be final by the Court of Appeals of the State of New York in two New York cases, which are the ones above mentioned. The court below then distinguishes the two New York cases by pointing out that the order for arbitration here was "made in the course of litigation inaugurated by the libellant under the general law", and was not a special proceeding to procure an order for arbitration.

F. THE PRACTICAL CONSEQUENCES INVOLVED.

The same logic which would permit an appeal from the interlocutory order in this case, would permit an appeal from every other step in the case. When a demurrer is overruled, counsel could with the same logic argue that an appeal might make unnecessary a trial of the facts; so likewise when a case is referred to a special master, or a commissioner in admiralty, or when exceptions are overruled to a libel. As stated in petitioner's brief:

> "To permit litigant to appeal at every step in the litigation from every adverse ruling would sanction piecemeal litigation and be productive of a multiplicity of suits. The rule is therefore that the cause must be fully disposed of."

This case will not be "fully disposed of" until the trial court enters a judgment upon the arbitration award as contemplated by section 8 of the United States Arbitration Act.

As a practical matter, after a hearing on the merits, perhaps no appeal at all will be necessary. If at that time an appeal is necessary every point can then be raised as is raised now.

Chief Justice Marshall has declared that thus to permit an appeal at an intermediate stage would make possible repeated appeals to the "great oppression" of the parties and that such an attempt to obtain the premature decision of this court is repugnant to the spirit and letter of our judicial system and that this court cannot exercise its ordinary appellate jurisdiction until a final judgment or decree is entered in the inferior court.

Life etc. Co. v. Adams (34 U. S.), 9 Pet. 573, 602, 604, 9 L. Ed. 234, 244, 245.

This court has alluded to the expense of repeated appeals as being behind the policy of forbidding appeals except from final orders. In the case of

McLish v. Roff, 141 U. S. 661, 666; 35 L. Ed. 893, 894,

it is declared:

> "From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error (with the single exception of a provision in the Act of 1875 in relation to cases of removal, which was repealed by the Act of 1887), have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal."

The court refers to the Act of 1891 establishing Circuit Courts of Appeals and points out that the public policy therein set forth to relieve this court of its "enormous overburden" would be defeated if repeated appeals in the same case were permitted.

II. THE ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE.

Petitioners' argument as to the invalidity of the arbitration clause is not relevant on this appeal, and on its merits is plainly answered by the express terms of the United States Arbitration Act.

Before the passage of the United States Arbitration Act in 1926, many courts refused to enforce arbitration agreements upon the alleged public policy that courts should not be ousted of their jurisdiction by the mere agreement of the parties.

Typical of such obsolete cases are those now cited by petitioners (without calling attention to the fact that policy purported to be expressed in those cases has since been reversed by Congress and the courts and condemned as "an anachronism").

These are:

Guaranty etc. Co. v. Green etc. Co., 139 U. S. 137, 35 L. Ed. 116;

Potomac etc. Co. v. Baker Salvage Co., 123 U. S. 40, 31 L. Ed. 75;

Blodgett v. Bebe Co., 190 Cal. 665; 214 Pac. 38.

The first case was decided in 1890 (and has no reference to arbitration at all). The second was decided in 1887. The California case was decided in 1923 and in 1927 the California legislature passed a statute overturning the rule therein laid down and enacted a statute similar to the Arbitration Act enacted by Congress the previous year.

California Statutes 1927, p. 404, adding §§1280-1293 to California Code of Civil Procedure.

Decisions denying force to arbitration clauses as allegedly "ousting the jurisdiction of the courts" provoked quite a public outcry. Business organizations protested so vigorously that Congress made a special investigation resulting in the United States Arbitration Act of 1926, which repudiates the alleged public policy set out in these old cases cited by appellants.

This is discussed by the court in

The Silverbrook, 18 F. (2d) 144, 146,

which quoted that part of the Congressional report declaring

"The need for the law arises from an anachronism of our American law."

This report is also referred to by this court in the *Marine Transit* case, cited below.

As recently stated by Mr. Justice Martin in

In re Utility Oil Corp., 69 F. (2d) 524, 526:

"The United States Arbitration Act • • • was intended • • • to change this view • • • It is quite apparent that Congress intended • • • to validate arbitration agreements as affirmative defenses in admiralty."

Even before the passage of the Arbitration Act, the United States Supreme Court stated in

Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109, 121, 122; 68 L. Ed. 582, 585:

"In admiralty also, agreements to submit controversies to arbitration are valid. Reference of maritime controversies to arbitration has long been common practice."

In that case was upheld the validity of the Arbitration Law of New York.

The validity of arbitration clauses (entered into since February 12, 1925) has been upheld under the Act by the United States Supreme Court in

Marine Transit Co. v. Dreyfuss, 284 U. S. 263, 76 L. Ed. 282.

This is in accord with the public policy set out in the Act of 1925 (9 U. S. Code, §2), which provides that

"A written provision in any maritime transaction or contract • • • to settle by arbitration a controversy • • • shall be valid, irrevocable and enforceable."

Counsel also refers to

5 *Corpus Juris*, 20,

as supporting the rule that "parties will not be permitted, by agreement, to submit to arbitration, to oust the jurisdiction of the courts". By adding a comma after the word agreement, petitioners have completely changed the meaning of the text writer. Of course, "by agreement to submit to arbitration" the parties can not oust the review allowed by law over the acts of the arbitrators, and the arbitration clause here must be construed to assume that in agreeing to arbitration they are subject to the laws governing arbitration. But to say that parties can not arbitrate because to do so would "oust the jurisdiction of the courts" is to open up a controversy which has been settled by Congress and the courts. Both now uphold and declare enforceable agreements to arbitrate.

The *Corpus Juris* article on arbitration was published in 1916. It was not until 1920, in New York, that the first statute was enacted expressly embracing agreements to arbitrate future disputes.

Sturges, Commercial Arbitration and Awards (1930), p. 88.

The validity of the New York statute was upheld by this court in the *Red Cross Line* case just cited.

The Thurston case did not involve any judicial controversy.

The libelants misinterpret the decision in *In re Thurston* (C. C. A. 2nd, 1931), 48 F. (2d) 578. The all-controlling circumstance in that case was that there was *no judicial controversy and no agreement to arbitrate.* A marine insurance policy covering a barge provided that in case of loss, a survey of the loss should be made. Each party was

to appoint one surveyor and, if they failed to agree, "an umpire was to be appointed pursuant to the United States Arbitration Act, section 5". (9 U. S. C. A., section 5.) On application, the District Court appointed an umpire. The umpire submitted a report, containing specifications of the work required to be done and the manner in which it should be done, in order to repair the damage caused by the disaster. On further application, the District Court confirmed the report, after making a certain modification. The appeal was by the owner of the barge who was dissatisfied with the modification.

The court was at pains to point out (page 579, bottom of column 2):

> "By the stipulation of the parties, he" (the umpire) "was to make no award fixing the amount of damages. His report was solely for the purpose of determining how the repairs should be carried out, and HAD NOTHING TO DO WITH THE AMOUNT OF THE ULTIMATE LIABILITY."

The court further stated (see beginning of last paragraph of column 2 on page 579) that the parties merely agreed to adopt the *procedure* for the appointment of an umpire in the manner provided for in section 5 of the United States Arbitration Act, and the court added, at the conclusion of the paragraph we have referred to, that "other provisions of the United States Arbitration Act were not made applicable by the parties."

The Circuit Court of Appeals held that the District Court erred in confirming the report, because there was no judicial controversy. In other words, the parties simply provided for the appointment of an umpire, in a

manner which happened to be in accord with the procedure set forth in section 5 of the United States Arbitration Act, who was to render a preliminary survey, but was to do nothing else. The upper court stated that "no judgment could be rendered on this report" (page 580, top of column 1), and that under the United States Arbitration Act, a decree is to be rendered upon the award only "if the basis of jurisdiction be a cause of action otherwise justiciable in admiralty", and the controversy must be such that "the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings". In the *Thurston* case, none of these things was true. There was simply, as we have said, a procedure for a survey upon which no admiralty proceeding could be initiated.

The distinction with the case at bar is manifest. Here, there is a judicial controversy. The plaintiff has brought suit for a money recovery under a contract containing a definite and positive arbitration clause. In the *Thurston* case, the court very properly held that the parties

> "did not stipulate for arbitration under this act • • • here the parties did not bring their dispute within either section 8 or section 9 of the act."

In our case section 8 is expressly applicable. For there is before the District Court a pending libel in admiralty, and in the admiralty proceeding, a motion for arbitration was made. There is, therefore, applicable the plain terms of section 8 declaring that

> "if the basis of jurisdiction be a cause of action otherwise justiciable in admiralty • • • the court shall then

have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award."

III. NO QUESTION OF PUBLIC POLICY IS INVOLVED IN THIS CASE.

Petitioners' argument on this phase of the case is somewhat confusing, but must be considered in two aspects. First it is suggested that arbitration per se is against public policy. It is not necessary to argue this point, as Congress has, after careful consideration, determined the public policy of the nation in this respect and has decided that public policy should favor arbitration. This is discussed under a previous heading.

Next it is suggested that arbitration is a device whereby a shipowner may escape liability for its negligence and in this connection cases are cited such as *The Kensington* (183 U. S. 263), and the *Corcoran* case (9 F. (2d) 13), to the effect that the court should not enforce such clauses. However, no such clauses are here involved. Counsel did not point to any such clauses in which the respondent seeks to exempt itself from liability for negligence. This makes pointless all the citations by petitioners on this phase of the case.

The argument that to permit arbitration is to permit a shipowner to free itself from liability assumes that the arbitrator will decide against the petitioners. However, if the arbitrator should attempt to put into effect anything contrary to the public policy of the United States or its paramount applicable laws, the court, by the express terms of the United States Arbitration Act retains jurisdiction.

There can be no presumption that the arbitrator will attempt to do anything contrary to public policy, but should he attempt to do so, the court can exercise its jurisdiction and refuse to enter any decree inconsistent with the laws of the United States or its public policy.

It is suggested that the trial court considered German law in granting arbitration. This is not true. Also an overruled case is cited to the effect that arbitration beyond the jurisdiction of this court is involved. This is not true either. Both these matters we discussed in the footnote on page 5 hereof.

Finally, it is suggested that the arbitrator might improperly apply German law. There is no presumption that the arbitrator will apply German law or that, if he does, he will do so contrary to American requirement. Where not contrary to American public policy, clauses involving the application of foreign law have often been upheld by the admiralty courts.

For example see:

London Assurance Co. v. Companhia De Moagens, 167 U. S. 149, 161; 42 L. Ed. 113, 121;

Olympia Canning Co. v. Union Marine Ins. Co., 10 F. (2d) 72;

Aetna Ins. Co. v. Sacramento-Stockton S. S. Co., 273 Fed. 55;

The Constantinople, 15 F. (2d) 97;

Boole v. Union Marine Insurance Co., 52 Cal. App. 207, 209; 198 Pac. 416;

Liberty etc. Co. v. New England etc. Inc., 25 F. (2d) 493, 495;

United etc. Co. v. Luketa, 58 F. (2d) 944, 945.

In the case at bar all the parties are German citizens, the contract was executed in Germany to be performed on a German vessel, and the alleged cause of action arose on the high seas on a German vessel and involves only German subjects.

However, the question of what law governs is of no materiality at this time, for all that is involved is the propriety of the arbitration. We are relying on the express terms of the United States Arbitration Act and not on any German law.

a. The agreement to arbitrate is in legible type and is binding upon petitioners, whether read by them or not.

Petitioners make the unfair suggestion that the arbitration provision in the passenger ticket could not be read with ordinary eyesight and refer to the photostatic copy of the ticket in the transcript. This photostatic copy is of reduced size and, even in reduced form, is legible.* The same point was made by petitioners in the trial court and the trial judge read the ticket and decided that it was legible. As a matter of fact the original passenger ticket itself, i. e., the duplicate copy retained by respondent, was produced by respondent on depositions taken in Germany and is now in the records of the District Court in San Francisco. By failing to produce the original on file with the court, petitioners are certainly estopped from arguing as to the legibility of its provisions and their reference to a photostatic copy reduced in size certainly calls for a rebuke.

---

*The type used in the passenger ticket is approximately agate, and is about the same size as that used on the upper division of each page of Webster's Standard Dictionary, and is larger than that used in the dictionary on the lower division of each page.

Petitioners further claim that the arbitration provision in the ticket was not called to their attention. This is not necessary, as failure to read the provisions does not relieve the passenger from them.

A decision by Judge Cardozo in the New York Court of Appeals discusses this matter.

Murray v. Cunard S. S. Co., 235 N. Y. 162; 139 N. E. 226, 228.

Accord:

Leviathan (Sherbo v. United States), 72 F. (2d) 286, 287-8; 1934 A. M. C. 1106, 1109.

Further suggestion is made that the provisions of the ticket are not binding because of the fact that the allegedly injured female is a minor. In view of the fact that she is suing on a contract she is bound by its provisions. This is discussed under the next heading.

IV. THE ARBITRATION PROVISION IS BINDING ON THE MINOR. HER CLAIM IS BASED ON THE CONTRACT AND SHE MUST TAKE THE CONTRACT AS SHE FINDS IT.

On this phase of the case it is essential to note that each libel is expressly designated as a "libel in rem • • • for breach of contract". (Tr. pp. 3 and 11.)

Each libel alleges in identical language as follows:

"IV.

On or about the 30th day of October, 1929 • • • the said libelant and his wife agreed with the said Hamburg American Line, that for a valuable consideration, they undertook to safely carry their minor child, Hildegard Schoenamsgruber, of the age of six years

across the ocean from Hamburg, Germany, to the City and County of San Francisco * * *."

"VI.

Said libelees and each of them thereupon broke and violated said contract to safely carry said minor child Hilda Schoenamsgruber from the said City of Hamburg to the said City and County of San Francisco in the following particulars, to-wit."

As the entire cause of action is based on alleged breach of the contract, the petitioners are bound by the provisions of the contract on which they rely.

However, suit cannot be brought on the contract, accepting it in part and repudiating it in part. The arbitration clause is part of the contract and if libelants seek to rely on the contract, they must accept it as a whole. The courts have held that provisions in passenger tickets are binding upon guardians bringing suit to seek damages for injuries to a minor.

The case of

The Finland, 35 F. (2d) 47,

involves a similar situation to the one at bar. There, the mother bought a ticket for the transportation of herself and her minor child. The father, as here, sued as guardian ad litem for injuries received by the child. The ticket contained a clause barring claims not filed within 30 days. The court held the time limitation valid and binding although the child was a minor.

The court quotes from

O'Laughlin v. Union Central Life Ins. Co., 11 Fed. 280:

"It is said that because the beneficiaries here are minors, that therefore the condition cannot be enforced. I have been unable to find any authority in support of that proposition, and it seems the counsel has not instanced any. *A guardian can bring the suit and is bound to bring it under the contract and according to the contract.* It is not a suit that cannot be brought. It is not a suit that the parties, by reason of their disability, cannot bring; but *it is a suit which the guardian can bring, and is bound to bring, I think, in accordance with the terms of the contract.*"

The court also cites the case of

Rady v. Netherlands etc. Co., 1929 A. M. C. 95; affirmed 28 F. (2d) 1017,

where the court likewise held a guardian ad litem bound by a passenger contract provision requiring suit to be brought within ninety days.

Recently the Circuit Court of Appeals for the Second Circuit has held a minor bound by a clause limiting the vessel's liability where that clause appeared in the passenger ticket under which she had been transported.

The Leviathan (Sherbo v. United States), 72 F. (2d) 286, 288; 1934 A. M. C. 1106, 1109.

The court there says:

"It is also claimed that the limitation of value in the ticket was not binding upon the plaintiff because she was a minor when she bought the ticket and used it. Her right to have her trunk loaded on the ship,

however, and carried to New York by the defendant was a contract right which she acquired by purchasing the ticket. Likewise as to her right to declare and pay for excess value with the correlative right to recover her actual damages up to the amount of her declaration if the defendant failed to perform and her property was injured by such failure.

The basis of her action is her status, by virtue of her ticket, as a passenger on the defendant's ship whose baggage was negligently injured by the defendant who undertook to carry it as a part of its obligations under her ticket. Its failure to handle it with due care was a breach of an implied condition of its undertaking.

She cannot sue to enforce her rights under the contract without being herself bound by its terms. Compare, Finland, 1929 A. M. C. 1396, 35 F. (2d) 47, 49; Pacific S. S. Co. v. Sutton, 1925 A. M. C. 1335, 7 F. (2d) 579. Decree affirmed."

None of the cases cited by petitioners under this heading involve attempts to repudiate on behalf of minors conditions of the contract upon which the minor is relying.

CONCLUSION.

It has been the policy of this court from the very beginning to oppose repeated appeals in cases and to require every matter in controversy to be settled in a single appeal. Every right that petitioners seek can be had upon appeal from the final decree required by the Arbitration Act. To permit an appeal now would involve a second hearing by this court in the event either party is dis-

satisfied with the final decree. The action of the court below in refusing to consider the premature appeal should be affirmed.

Dated, San Francisco, California,
January 2, 1935.

Respectfully submitted,
J. HAMPTON HOGE,
S. HASKET DERBY,
Proctors for Respondent.

DERBY, SHARP, QUINBY & TWEEDT,
Of Counsel.

Due service and receipt of a copy of the within is hereby admitted

this.....*day of January, 1935.*

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.....

.....

.....

Proctors for Petitioners.

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FILE COPY

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CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

Nos. 424 and 425.

HILDEGARD SCHOENAMSGRUBER, by Gustav Schoenamsgruber, her guardian, *Petitioner*,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland", her engines, etc., *Respondent*,

and

GUSTAV SCHOENAMSGRUBER, *Petitioner*,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland", her engines, etc., *Respondent*,

---

SUPPLEMENTAL BRIEF FOR RESPONDENTS.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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SUPPLEMENTAL BRIEF FOR RESPONDENTS.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Respondents herein most respectfully ask leave to file this supplemental brief for the reasons that since preparing and filing our brief herein two decisions have been made by this Court affecting one of the issues involved herein and because of additional matters requiring comment.

The Shanferoke Case should not be applied to admiralty proceedings.

After respondents served their briefs and sent them on from San Francisco to be filed, this court rendered two decisions which have a direct bearing on the issue of jurisdiction. These cases are:

> Shanferoke etc. Corp. v. Westchester Service Corp., —— U. S. ——, 79 L. ed. adv. ops. 269, decided January 7, 1935.
>
> Enelow v. New York Life Ins. Co., —— U. S. ——, 79 L. ed. adv. ops. 247, decided January 7, 1935.

Both were actions at law. In the Enelow case an equitable defense based on fraud was set up in bar. The court stayed the proceeding at law until the equitable issues first be settled. In the Shanferoke case a defense was set up to the effect that plaintiff had failed to submit this dispute to arbitration as required by the contract sued upon. The court denied defendant's motion to stay the law action until the plaintiff submitted to arbitration.

Thus in the Enelow case proceedings at law were stayed until after the disposition of the equitable issues. In the Shanferoke case the trial court refused to stay the proceedings at law.

In both cases this court has held (to use the language of the Shanferoke case) that

> "an order granting or denying a stay based on an equitable defense or cross-bill **interposed in an action at law** under Sec. 274b, U. S. C. title 28, Sec. 398, is appealable under Sec. 129" (28 U. S. Code, Sec. 227).

The court holds that the special defense setting up the arbitration agreement is an equitable defense and that the motion for a stay is an application for an interlocutory injunction based on this special defense. In the Shanferoke case counsel did not raise the question here discussed but

this court based its opinion upon the decision in the Enelow case.

However, the Enelow case is based upon the distinction between law and equity and on its face is not applicable to admiralty, where there is no such distinction, and in fact no equity jurisdiction as such.

In the Enelow case the Chief Justice expressly points out the distinction as regards

> "an exercise of equitable jurisdiction in granting or refusing an injunction, as distinguished from a mere stay of proceedings."

In both the Enelow and Shanferoke cases the stay is treated as an exercise of jurisdiction by an equity court directed against another court, to wit, the law court, and a stay against another court is treated as an injunction, whereas a stay in the same court by inference should not be so considered.

This is made plain by the language of the Chief Justice in the Enelow case, reading as follows:

> "The power to stay proceedings in another court appertains distinctively to equity * * * and the grant or refusal of such a stay by a court of equity of proceedings at law is a grant or refusal of an injunction within the meaning of Sec. 129.
>
> "And, in this respect, it makes no difference that the two cases, the suit in equity for an injunction and the action at law in which proceedings are stayed, are both pending in the same court, in view of the established distinction between 'proceedings at law and proceedings in equity'." * * *
>
> "The same order of trial is preserved as under the system of separate courts."

This language makes it plain why the Enelow and Shanferoke cases are inapplicable to admiralty proceedings. In admiralty there is no combination of two courts. A stay in admiralty is therefore not an injunction by one court

(the equity court) against another court (the law court). In admiralty therefore a stay is "a mere stay of proceedings" in the same court and not "an exercise of equitable jurisdiction in granting or refusing an injunction" against another court. In fact it has been often said that although admiralty is influenced by equitable principles yet it has no equitable jurisdiction as such. The authorities are collected in

> 1 Benedict on Admiralty (5th ed.), pp. 96, § 70, and 1 Corpus Juris, 1277-8, § 92, note 27 and 28.

In the text first cited it is said that

> "The court of admiralty is not a court of general equity nor has it the characteristic powers of a court of equity."

Therefore a stay in admiralty is not an order denying or granting an injunction against another court and therefore is not appealable as an interlocutory order for an injunction under Sec. 129 of the Judicial Code (28 U. S. Code Sec. 227).

This conclusion is fortified by the following additional principles. As a matter of public policy repeated appeals in the same proceeding should be discouraged (our original brief, p. 19) and appeals should be allowed only from final orders completely disposing of the litigation (idem, p. 10). Therefore interlocutory appeals should not be encouraged unless expressly authorized by statute. In admiralty there is an express statute enacted in 1926 (28 U. S. Code, Sec. 227) allowing appeals from interlocutory decrees "determining the rights and liabilities of the parties." In the face of the public policy against repealed appeals in the same case it is respectfully submitted that the scope of that specific statute should not be extended by construction to other orders not contemplated by that statute.

Furthermore this case is governed by a specific section

of the United States Arbitration Act governing admiralty cases (9 U. S. Code, § 8) and under that act there is a continuing jurisdiction in a single court, the admiralty court, from the time the libel is filed until judgment is eventually filed upon the award of the arbitrators.

The New York Cases Cited by Respondents.

With respect to the New York cases cited by respondents, it has been called to our attention that they depend upon section 6-a of the New York Arbitration Law expressly cited in the Goldston case (238 N. Y. 22), upon which is based the Marchant case (252 N. Y. 284). Section 6-a declares arbitration under a contract to be a "special proceeding." No such provision is contained in the United States arbitration act.

Furthermore, under New York practice, the rule with respect to appeals and as to what constitutes an appealable order is governed by statutes entirely different in their scope. See, for example, Secs. 609 and 588 of the New York Practice Act permitting appeals from many interlocutory orders and Section 631 specifically permitting appeals from orders in special proceedings.

The clause in the arbitration provision "waiving recourse to the courts at law" does not invalidate the agreement for arbitration.

In their brief petitioners emphasized that part of the arbitration clause quoted above as indicating an attempt to avoid the jurisdiction of the courts and this respondents argue vitiates the entire arbitration clause. We replied by stating (p. 23) that the parties can not by agreement oust the review allowed by law over the acts of arbitrators and that the arbitration clause here must be construed to assume that in agreeing to arbitration these parties contemplated they would be subject to the laws governing arbitration.

We cited no authority at that time, but since our attention has been called to a recent decision by the Circuit Court of Appeals for the Eighth Circuit, and to some language by Mr. Justice Cardozo in one of the cases mentioned in the brief.

In the case of

> McCullough v. Clinch-Mitchell Const. Co., 71 F. (2d) 17 (certiorari denied October 8, 1934),

there was involved an arbitration clause containing a provision similar to and more drastic than the one here under discussion. The clause in the McCullough case provided for the finality of the decision of the arbitrator and went on to provide that

> "each and every of said parties hereby waives any and all right of action, suit or suits, or other remedy, in law or otherwise, under this agreement or arising out of the same."

There, as here, it was contended that the invalidity of the waiver vitiated the arbitration clause. However, that court, after admitting the waiver to be invalid, declares (71 F. (2d) 21):

> "But this failure of the waiver clause does not necessarily mean that the entire arbitration clause is dragged down by the weight of that invalidity.
>
> "It is the duty of the court to preserve as much of the contract as may properly survive. If the remainder of this provision is complete and it can be gathered that the parties intended it to operate irrespective of the waiver clause, then the balance of this provision should be preserved."

The court points out that the waiver clause emphasizes the intent of the parties to submit to arbitration. As there said:

> "It is obvious that the place of the waiver clause was purely to give added effect to the decision of the

> engineer. The provision for arbitration is complete without it."

The court goes on to declare (71 F. (2d) 22) that:

> "with the complete provision as to arbitration with the above waiver clause eliminated, we cannot believe that the parties here had in mind that arbitration would be undesirable if decisions thereunder did not bar legal remedies.
>
> "The waiver was intended to add effectiveness to an award or decision but the declared purposes of the entire provision were made highly effectual without the waiver clause. We think the arbitration clause is valid and should be upheld."

It is interesting to note that the waiver clause in the original contract in German is "unter Verzicht auf Anrufung der ordentlichen Gerichte", and that while we believe the correct translation to be "waiving recourse to the courts at law" it was originally translated as "subject to the laws applicable thereto" (Transcript, pp. 38, 20, 28). The effect of the McCullough case is to restore this original translation.

In connection with the principle of giving effect to the dominant intention of the agreement to arbitrate, regardless of unenforcible detail, should be cited the illuminating opinion of Mr. Justice Cardozo in

> Marchant v. Mead Mfg. Co., 252 N. Y. 284, 169 N. E. 386.

There the court declares (169 N. E. 386, 389-390):

> "Contracts to submit to arbitration must answer to like tests. * * * There may be a dominant intention to arbitrate at all events, the machinery of selection being merely modal and subordinate. If so, the failure of the means will not involve as a consequence the frustration of the end."

A number of arbitration cases are discussed and the rule said to be to give effect to arbitration clauses although it may be necessary to disregard details provided for specifically by the parties.

Some Additional Citations.

In the case of

Lee v. Swedish American Line, 6 F. Supp. 342,

the district court of New York holds valid against a three-year-old infant travelling on her mother's ticket a clause therein requiring 45 days notice of claim and suit within a year thereafter.

This is in accord with several other cases cited by us as holding a minor bound by the provisions of a ticket for breach of which suit is brought.

Certainly if the infant's claim on a contract may be barred altogether by contract provisions it is not unreasonable to submit that claim to decision by arbitration. In either case, where the minor relies upon a contract as a basis for suit, he should be held to take it as a whole, and not permitted to rely only upon such parts as are favorable.

It is significant that the New York Arbitration Act as adopted in 1921 forbade infants from making arbitration agreements (Practice Act, § 1448). However when Congress enacted its Arbitration Act, taking the New York Act as its model, it expressly omitted that part referring to minors. There is no inherent reason why cases involving minors should be differentiated. It is true minors have no right to make contracts, but where they sue on a contract made for their benefit, all the cases require them to take that contract as they find it, and not to delete that part which they do not like, holding the other party to the rest of the contract.

CONCLUSION.

The order appealed from was interlocutory and not appealable. However, if this court rules otherwise and considers the validity of the arbitration clause, it is respectfully submitted that the clause is valid and enforcible and that the action of the trial judge in directing arbitration was proper and should be affirmed.

Respectfully submitted,

J. Hampton Hoge,
S. Hasket Derby,
Joseph C. Sharp,
Proctors for Respondent.

Derby, Sharp, Quinby & Tweedt,
Of Counsel.

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In the Supreme Court

OF THE

United States

October Term, 1934

HILDEGARD SCHOENAMSGRUBER, by Gustav Schoenamsgruber, her guardian,

Petitioner,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland," her engines, etc.,

Respondent,

and

GUSTAV SCHOENAMSGRUBER,

Petitioner,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland," her engines, etc.,

Respondent.

Nos. 424 and 425

PETITION FOR A REHEARING

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

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To Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioners above named respectfully ask a rehearing of the above entitled causes decided by this

Honorable Court on March 4th, 1935. We respectfully urge the following grounds for a rehearing:

YOUR HONORABLE COURT HAS ERRONEOUSLY DECIDED THAT THE APPEALS HEREIN WERE NOT TAKEN "FROM AN INTERLOCUTORY DECREE IN ADMIRALTY DETERMINING THE RIGHTS AND LIABILITIES OF THE PARTIES," WITHIN THE MEANING OF THE ACT OF APRIL 3, 1926, 44 STAT. 233.

As the pleadings and proceedings in the lower court are fully set forth in the briefs, we shall not restate them here. Suffice it to say that the Circuit Court of Appeals dismissed the appeals herein on the ground that the order of the District Court compelling the parties to proceed to arbitration in conformity with the purported stipulation contained in the Contract of Carriage, alleged to have entered into between respondents and the mother of the infant libelant (one of the petitioners herein), was an interlocutory order and therefore not appealable.

In support of our contention that the order was final and appealable, we argued that the order fixed and determined the rights of the parties in that it was a judgment or decree enforcing the arbitration provisions in the contract. It was, therefore, in the language of the Circuit Court of Appeals in KRAUSS BROS. v. BOSSERT & SONS, 62 Fed. (2d) 1004, *"essentially an escape from judicial trial; the court takes a hand only so far as some sanction is necessary*

to compel the performance of the agreement to adopt the means provided."

To state the matter otherwise, Title 9 U. S. C. A. provides for the enforcement of arbitration agreements in proceedings in admiralty, and for a stay of proceedings pending such arbitration. When an order directing the parties to proceed to arbitration is made, the proceedings under the libel are at an end; the controversy is then sent to the arbitrator; the court performs no other function except to enter a judgment or decree on the award. The court retains no power to hear and determine the cause on the merits, or to render a decree on the facts. The only remedy of the aggrieved party is under Section 10 of the Act, which reads as follows:

> "In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators."

As is well said in KRAUSS BROS. v. BOSSERT & SONS, supra: "The judgment follows automatically unless the award has been vacated under Section 10, *and that is an independent application.*" Accordingly, the decree directing arbitration is a final decree in admiralty since it denies the libelant his judicial remedy and remits him to the judgment of an arbitrator, perhaps unskilled in the law and usually, as in this case, selected by his adversary. The court thereafter is a mere medium through which, or an arm by which, the decision of the arbitrator may be enforced. That we have not misconstrued the effect and consequences of the decree, we quote the language of Section 11:

"In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form *not affecting the merits of the controversy.*

> The order may modify and correct the award, *so as to effect the intent thereof* and promote justice between the parties."

The Section last quoted thus precludes a hearing on the merits of the controversy by the court. The claimant is ousted of his judicial remedy. May we not by way of analogy suggest that it would be fully as logical to hold that any final judgment is not final because it might thereafter be impeached for fraud in its procurement—either by motion in the court in which it was rendered, by a proceeding in the nature of a writ of error *coram nobis,* or by a suit in equity for its annulment? We repeat that the order enforcing the provision for arbitration is a final disposition of the cause. The power reserved by the court is only to do the ministerial, not the judicial, act of entering judgment upon the award and enforcing the same. It is a duty which might with equal propriety be delegated to the clerk. Unless the aggrieved party institutes an independent proceeding under Section 10, or Section 11 of the Act, to vacate the award, the decision of the arbiter is in all respects final.

In both the petition for a Writ of Certiorari granted by this court, and in our brief, we showed, conclusively, we submit, that the decision of the Circuit Court of Appeals in the instant case was at variance with every prior decision of every court, state and federal, in which the question of the finality of such an order has arisen.

See:

KRAUSS BROS. v. BOSSERT & SONS, supra;

MARCHANT v. MEAD MFG. CO., 252 N. Y. 284, 169 N. E. 386 (opinion of Mr. Justice Cardozo);

HOSIERY MFG. CORP. v. GOLDSTON, 238 N. Y. 22, 143 N. E. 777;

IN RE UTILITY OIL CORP., 68 Fed. (2d) 524;

CALIFORNIA PRUNE AND APRICOT GROWERS' ASS'N v. KATZ AMERICAN CO., 60 Fed. (2d) 788.

No decision pronouncing a contrary rule was cited by respondents and none is cited in the opinion of Mr. Justice Butler, saving SHANFEROKE CORP. v. WESTCHESTER, 79 L. ed. 5. It is true that in the case last mentioned Mr. Justice Brandeis says that:

> "The order of the District Court denying the stay was not a final judgment appealable under Section 128 of the Judicial Code,"

but the court holds that as an interlocutory order, having the effect of a denial of an injunction, it was appealable under Section 129.

A different Section (Section 3, Title 9, U. S. C. A.) was there involved, the action being one at law for the breach of a contract to purchase coal. The one decision cited by Justice Brandeis in support of the statement that the order of the District Court granting the stay was not a final and appealable judgment, is

GENERAL ELECTRIC CO v. MARVEL, 287 U. S. 430. That case, which did not involve arbitration, states merely the legal truism that review of interlocutory orders must generally await appeal from the final decree. The order there appealed from, dismissing a counterclaim, was properly held an interlocutory order which could be reviewed only on appeal from the final judgment. Here, however, the libelant has no such remedy, as there is no appeal on the law and the facts from the decision of the arbitrator, as in other causes in admiralty. Into the merits of the arbitrator's decision the District Court cannot go. The court becomes merely a registrar of the edict of the representative of a foreign power. Not alone the power of our courts, but our own national sovereignty is subservient to the whim and caprice of the emissary of the *petit corporal* of the Reich.

Similar observations may be made as to the other decisions cited in the footnote to Mr. Justice Butler's opinion.

ARNOLD v. UNITED STATES, 263 U. S. 427, was an action on a contractor's bond. It was held that a judgment of a Circuit Court of Appeals modifying a judgment of a District Court so as to award a jury trial to the intervenors, to effect which the case was remanded, was not final so as to be the subject of review by the Supreme Court.

In LOS ANGELES BRUSH MFG. CORP. v. JAMES, JUDGE, 272 U. S. 701, there was a petition for a writ of mandamus to compel the District Court to

hear a patent case rather than to refer it to a master. This court properly held that mandamus does not lie to control judicial discretion. Moreover, since the special master was merely the arm of the court, his findings would have been subject to review on the merits. It also appeared that there was no abuse of discretion in the order of reference by reason of the fact that the hearing of the case, which was a suit for the infringement of a patent, would be protracted, and that the calendar of the court below was congested by other matters entitled to precedence. The decision in nowise involved the question of the appealable character of the order complained of.

A similar situation was present in *Ex parte* PETERSON, 253 U. S. 300, which was an application for mandamus or prohibition for relief against the appointment by the District Court of an auditor to take an account in an action at law and to report his findings to the jury for the purpose of simplifying the issues. The order complained of expressly declared that the auditor should not finally determine any of the issues in the action, the final determination of all issues of fact to be made by the jury at the trial. This was a totally different situation from that of the case at bar, where the court only retains jurisdiction to enter judgment on the award of the arbitrator. It may also be noted that in the Peterson case there was a dissent by Justices McKenna, Pitney and McReynolds.

Ex parte SIMONS, 247 U. S. 231, was a petition for mandamus to correct an error of the District Court

in ordering an action at law transferred to the equity side of the court. In an opinion written by the late Justice Holmes, it was held that the error might be corrected by granting mandamus to require the District Court to give plaintiff her right to a trial at common law, and the rule was made absolute. This decision, though cited as authority to the contrary, supports the contention of petitioners herein. There is no distinction in principle between the two cases. In the *Simons* case it was contended that the order depriving petitioner of her right to a trial at common law could be corrected by mandamus without awaiting a final disposition of the cause, and this court sustained the contention. In the case at bar it is contended by petitioners that the order depriving them of any judicial trial is a final order subject to immediate review without waiting for the decision of the Consul of a foreign nation to whom the cause should never have been referred. It would be difficult to visualize a case lending us stronger aid. We quote a paragraph from the opinion of the late and revered Justice:

> "If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake. It does not matter very much in what form an extraordinary remedy is afforded in this case. But, as the order may be regarded as having repudiated jurisdiction of the first count, mandamus may be adopted to require the district court to proceed and to give the plain-

tiff her right to a trial at common law. See BROWN v. BUCK, 75 Mich. 274, 5 L. R. A. 226, 13 Am. St. Rep. 438, 42 N. W. 827."

In REXFORD v. BRUNSWICK, 228 U. S. 339, it was held that the Circuit Court of Appeals erred in entertaining the appeal because the decree of the lower court disposed of only some of the issues and retained the cause for further orders with a reference to a special master to take the remaining proofs. With that decision we have no quarrel, as there was no abdication of its jurisdiction, as there is here, by the District Court.

LATTA v. KILBOURN, 150 U. S. 524, clearly states the true rule:

> "It is first contended on behalf of the appellees that this appeal cannot be entertained by this court for the reason that the decree of October 27, 1886, was the final decree in the cause from which an appeal should have been taken. We are clearly of opinion that this proposition cannot be sustained. It is well settled by the decisions of this court that where the purpose of the suit is to obtain an account, such as that prayed for by the bill in this case and directed by the order of October 27, 1886, the decree is of such an interlocutory character that no appeal will lie therefrom. BEEBE v. RUSSELL, 60 U. S. 19 How. 283, 285 (15:668); GREEN v. FISK, 103 U. S. 518 (26:486); KEYSTONE MANGANESE & I. CO. v. MARTIN, 132 U. S. 91 (33:275); LODGE v. TWELL, 135 U. S. 232 (34:153); McGOURKEY v. TOLEDO & O. C. R. CO., 146 U. S. 544, 550 (36:1083). In this last case the authorities are thoroughly reviewed as to what constitutes a final decree, and it was laid down as the general rule *that if the court*

made the decree fixing the rights and liabilities of the parties, and thereupon referred the case to a master for a ministerial purpose only, and no further proceedings in court are contemplated, the decree is final; but if it referred the case to him for a judicial purpose, as to state an account between the parties upon which a further decree is to be entered, the decree is not final."

It will thus be observed that in the pertinent decisions cited by Mr. Justice Butler, this court has established the rule that an order which fixes the rights of the parties, the court retaining only jurisdiction to render a judgment upon the report of an arbitrator or a master, or where the court denies the right to a judicial remedy to which the aggrieved party is entitled, the decree is final and appealable.

THE OPINION IN THIS CAUSE IS AT VARIANCE WITH THE OPINION OF JUSTICE BRANDEIS IN SHANFEROKE COAL AND SUPPLY CORPORATION v. WESTCHESTER SERVICE CORPORATION, 79 L. Ed. 269.

The opinion of Mr. Justice Butler misconstrues the position taken by petitioners in their supplemental brief. We did not, as stated in the opinion, abandon our claim that the order appealed from was final, but, relying on the *Shanferoke* case, we asserted that even if the order was not final, nevertheless it was appealable as an interlocutory order granting a stay which has the effect of an injunction. If the order *denying a stay* in the *Shanferoke* case was in effect an order *denying an injunction*, why is not the order *granting*

the stay in the instant case, an order in effect *granting an injunction*? It is stated in the opinion that courts of admiralty have no power to grant injunctions. The statute, however, in arbitration cases (Title 9, Section 3, U. S. C. A.), provides that the District Courts "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, etc."

This, as pointed out in the *Shanferoke* case, has the effect of an injunction, even though it may not be called an injunction *eo nomine*. Not what the order is called, but what it is, determines its character.

It is respectfully submitted, therefore, that a rehearing should be granted and the judgment of the Circuit Court of Appeals reversed.

DATED: San Francisco, California,
March 14th, 1935.

HARRY H. SEMMES,
VINCENT W. HALLINAN,
EMMETT ROBERT BURNS,
WILLIAM F. HERRON,
Proctors for Petitioners and Libelants.

I hereby certify that the foregoing petition for a rehearing is presented in good faith and not for delay.

WILLIAM F. HERRON,
of Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES.

Nos. 424, 425.—October Term, 1934.

Hildegard Schoenamsgruber, by Gustav Schoenamsgruber, Her Guardian, Petitioner, 424 *vs.* The Hamburg American Line, Claimant of the Motorship "The Oakland," Her Engines, Etc.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.
Gustav Schoenamsgruber, Petitioner, 425 *vs.* The Hamburg American Line, Claimant of the Motorship "The Oakland," Her Engines, Etc.	

[March 4, 1935.]

Mr. Justice Butler delivered the opinion of the Court.

Petitioner in No. 424 is the minor daughter of petitioner in No. 425. Each filed a libel in admiralty in the district court for northern California against respondents claiming damages on account of personal injuries alleged to have been inflicted upon the child while she was a passenger on the Oakland. The libels assert that the wrongful act constituted a breach of respondents' contract to carry the child safely from Hamburg, Germany, to San Francisco. The answers, in addition to denying material allegations of the libels, alleged that the contract contained the following provision: "Complaints based on failure to fulfill the terms of this contract, claims for damages, etc., on the part of the passenger must be filed with the representative (agent) of the Hamburg-American Line at the port of destination immediately after the arrival of the ship. In the event that an agreement cannot be reached, both parties agree to refer the matter to the German Consul at the port of destination whose decision will be acceptable to both parties, subject to the laws applicable thereto."

Respondents applied to the court for arbitration under the United States Arbitration Act, 9 U. S. C., §§ 1-15. Opposing the application, petitioners maintained that the child was carried as a passenger not in pursuance of the contract alleged in the answers but upon one that contained no provision for arbitration. After hearing and upon consideration of the evidence, the court ordered the parties to proceed to arbitration, stayed trial of the action pending the filing of the award and retained jurisdiction to make orders and enter decrees contemplated by the Act or otherwise permitted or required by law. 9 U. S. C., § 8. Petitioners appealed; the Circuit Court of Appeals held the orders to be interlocutory and nonappealable and dismissed the appeals. 70 F. (2d) 234.

Claiming that decision to be in conflict with *Krauss Bros. Lumber Co.* v. *Louis Bossert & Sons* (C. C. A.-2), 62 F. (2d) 1004, and that the orders are final, petitioners applied for, and this court granted, writs of certiorari. Later, but before argument of these cases, we announced decisions in *Enelow* v. *New York Life Insurance Co.*, — U. S. —, and *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, — U. S. —, which definitely show that the orders are not final and therefore not appealable under § 128, Judicial Code, 28 U. S. C., § 225.[1]

Abandoning their claims that the orders are final, petitioners by supplemental brief argue that they are appealable under § 129, 28 U. S. C., § 227. They rely on the *Shanferoke Case*. That decision was based on the *Enelow Case*. Each of these was an action at law in which the defendant by answer sought equitable relief. In each the order held appealable stayed proceedings on the law side and operated as an injunction, within the meaning of that section, against proceedings in another court. The cases now before us are in admiralty. The orders appealed from merely stay action in the court pending arbitration and filing of the award. As shown by the *Enelow Case*, they are not interlocutory injunctions within the meaning of § 129. And plainly, so far as concerns appealability, they are not to be distinguished from an order post-

[1]And see General Elec. Co. *v.* Marvel, 287 U. S. 430, 432. Arnold *v.* Guimarin & Co., 263 U. S. 427, 434. Los Angeles Brush Corp. *v.* James, 272 U. S. 701. Ex parte Peterson, 253 U. S. 300, 305. Ex parte Simons, 247 U. S. 231, 239. Rexford *v.* Brunswick-Balke Co., 228 U. S. 339, 345. Latta *v.* Kilbourn, 150 U. S. 524, 539. McGourkey *v.* Toledo & Ohio Railway, 146 U. S. 536, 545, *et seq.* De Liano v. Gaines, 131 U. S. Appendix, p. ccxiv. Craighead *v.* Wilson, 18 How. 199, 201.

poning trial of an action at law to await the report of an auditor.

Save as therein otherwise specified, § 129 extends only to suits in equity. Its provisions relating to injunctions and receivers were put in present form by the Act of February 13, 1925, 43 Stat. 937. Before that Act, appealability was expressly confined to suits "in equity".[2] Its legislative history shows the omission of the phrase was not intended to remove that limitation.[3] While courts of admiralty have capacity to apply equitable principles in order the better to attain justice, they do not have general equitable jurisdiction[4] and, except in limitation of liability proceedings,[5] they do not issue injunctions.[6] The Act of April 3, 1926, 44 Stat. 233, added to § 129 a provision granting appeal "from an interlocutory decree in admiralty determining the rights and liabilities of the parties." This specification, taken in connection with the other parts of the section, indicates that Congress did not intend to make appealable any other interlocutory decrees in admiralty. Moreover, there is nothing to indicate that Congress intended to allow repeated appeals in the class of cases to which these belong. That would be contrary to its long-established policy.[7] The orders under consideration may be reviewed on appeal from the final decrees. § 128, Judicial Code. Petitioners' contention that they are interlocutory injunctions under § 129 is without merit.

Affirmed.

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[2]§ 7, Act of March 3, 1891, 26 Stat. 828, as amended February 18, 1895, 28 Stat. 666; June 6, 1900, 31 Stat. 660; April 14, 1906, 34 Stat. 116; March 3, 1911, § 129, 36 Stat. 1134. And see The Transfer No. 21, 218 Fed. 636.

[3]See "A General Review of H. R. 10479, Sixty-seventh Congress, to amend the Judicial Code, further to define the jurisdiction of the Circuit Courts of Appeals and of the Supreme Court, and for other purposes, by the Chief Justice of the United States" (Senate Committee Print, 68th Congress, 1st Session, p. 4). "An analysis of S. 2060, to amend the Judicial Code, further to define the jurisdiction of the Circuit Courts of Appeals and of the Supreme Court, and for other purposes." (Senate Committee Print, 68th Congress, 1st Session, p. 10.)

[4]Watts *v.* Camors, 115 U. S. 353, 361. The Eclipse, 135 U. S. 599, 608. United States *v.* Cornell Steamboat Co., 202 U. S. 184, 194.

[5]Providence and N. Y. S S. Co. *v.* Hill Mfg. Co., 109 U. S. 578. The San Pedro, 223 U. S. 365. Hartford Accident Co. *v.* Sou. Pacific, 273 U. S. 207, 218. Marine Transit Co. *v.* Dreyfus, 284 U. S. 263, 278.

[6]Benedict on Admiralty (5th ed.), § 70. Paterson *v.* Dakin, 31 Fed. 682.

[7]Forgay *v.* Conrad, 6 How. 201, 205. McLish *v.* Roff, 141 U. S. 661, 665.